2957 No. 15005

United States
Court of Appeals
For the Ninth Circuit

See Vol. 2958

THE FLINTKOTE COMPANY, a Corporation,

Appellant,

vs.

ELMER LYSFJORD and WALTER R. WALDRON, Doing Business as Aabeta Co.,

Appellees.

Transcript of Record
In Three Volumes

Volume I
(Pages 1 to 432)

Appeal from the United States District Court for the Southern District of California, Central Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—4-13-56

No. 15005

United States
Court of Appeals
For the Ninth Circuit

THE FLINTKOTE COMPANY, a Corporation,

Appellant,

vs.

ELMER LYSFJORD and WALTER R. WALDRON, Doing Business as Aabeta Co.,

Appellees.

Transcript of Record
In Three Volumes

Volume I
(Pages 1 to 432)

Appeal from the United States District Court for the Southern District of California, Central Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—4-13-56

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

INDEX PAGE

INDEX PAGE

INDEX PAGE

INDEX PAGE

NAMES AND ADDRESSES OF ATTORNEYS

Attorneys for Appellant:

McCUTCHEN, BLACK, HARNAGEL & GREENE,
HAROLD A. BLACK,
G. RICHARD DOTY,
650 Roosevelt Building,
727 West Seventh Street,
Los Angeles 17, California.

Attorney for Appellee:

ALFRED C. ACKERSON, ESQ.,
Room 770,
417 South Hill Street,
Los Angeles 13, California.

In the District Court of the United States, Southern District of California, Central Division

No. 14350T

ELMER LYSFJORD and WALTER R. WALDRON, Doing Business as Aabeta Co.,

Plaintiffs,

vs.

L. D. REEDER COMPANY, R. E. HOWARD COMPANY, DIAMOND HEAD SCREW CORP., Formerly Known as JOSEPH, INC., Formerly Known as THE HAROLD E. SHUGART COMPANY, INC., Formerly Known as HAROLD E. SHUGART COMPANY, INC., R. W. DOWNER COMPANY, COAST INSULATING PRODUCTS, A. D. HOPPE Doing Business Under the Fictitious Name and Style of THE SOUND CONTROL COMPANY, PAUL H. DENTON, Doing Business as THE PAUL H. DENTON CO., CARROLL DUNCAN, Doing Business Under the Firm Name and Style of ACOUSTICS, INC., L. D. REEDER, R. E. HOWARD, G. H. MORRIS, ROY DOWNER, JR., CHARLES L. NEWPORT, GUS CROUSE, ACOUSTICAL CONTRACTORS ASSOCIATION OF SOUTHERN CALIFORNIA, INC. (Formerly Known as ACOUSTICAL CONTRACTORS ASSOCIATION OF SOUTHERN CALIFORNIA, INC.), THE FLINTKOTE COMPANY, FIRST DOE, SECOND DOE, THIRD DOE, and FOURTH DOE,

Defendants.

COMPLAINT
(Under Sherman Antitrust Act)

The above-named plaintiffs complain of the above-named defendants, and each of them, and allege as follows:

I.

Jurisdiction

1.

The causes of action in this complaint arise under the laws for the protection of trade and commerce against restraints and monopolies, and more particularly under the provisions of law contained in Title 15 of the United States Code, including Sections 1, 2, and 7 of the Act of Congress known as the Sherman Act, and Sections 4, 5, 12, and 16 of the Act of Congress known as the Clayton Act (15 U.S.C.A. secs. 1, 2, 15, 16, 22, 26; 26 Stat. 209, 26 Stat. 210, 38 Stat. 731, 38 Stat. 736, 38 Stat. 737).

2.

The purpose of this action is to recover three-fold the damages sustained by plaintiffs, plus reasonable attorney's fees and costs of suit, caused by defendants' illegal, monopolistic practices and restraints of trade and commerce, particularly as affecting plaintiffs, all as more fully set forth herein, for an injunction to restrain said illegal acts in the future, and for such other and further relief to which plaintiffs may be entitled.

II.

Plaintiffs

3.

The plaintiffs, Walter R. Waldron and Elmer Lysfjord, are residents of the City and County of Los Angeles, State of California, and since in or about January, 1952, have been engaged in the business of rendering an acoustical tile contracting service under the fictitious firm name and style of "aabeta co." and have maintained principal offices and conducted said business in the City and County of Los Angeles, California, and in the City and County of San Bernardino, California.

III.

Defendants

4.

The defendants, L. D. Reeder Company, R. E. Howard Company, Diamond Head Screw Corp., R. E. Downer Company, Coast Insulating Products, A. D. Hoppe, Paul H. Denton, and Carroll Duncan, during all of the times named herein have been and now are engaged in the business of purchasing, distributing, installing, and contracting for the installation and sale of acoustical tile in the State of California, and each said defendant conducts said business in the City and County of Los Angeles, State of California, and regularly maintains an office and principal place of doing business in said City, County, and State.

5.

L. D. Reeder was, during all of the times mentioned herein, an officer, director and managing executive of the defendant L. D. Reeder Company, and during all of said times actively participated as such in the illegal acts complained of herein.

6.

R. E. Howard was, during all of the times mentioned herein, an officer, director, and managing executive of the defendant R. E. Howard Company, and during all of said times actively participated as such in the illegal acts complained of herein.

7.

G. H. Morris was, during all of the times mentioned herein, an officer, director, and managing executive of the defendant Diamond Head Screw Corp., and during all of said times actively participated as such in the illegal acts complained of herein.

8.

Roy Downer, Jr., was, during all of the times mentioned herein, an officer, director and managing executive of the defendant R. W. Downer Company, and during all of said times actively participated as such in the illegal acts complained of herein.

9.

Charles L. Newport was, during all of the times mentioned herein, an officer, director and managing executive of the defendant Coast Insulating Products, and during all of said times actively partici-

pated as such in the illegal acts complained of herein.

10.

Gus Crouse was, during all of the times mentioned herein, an officer, director, and managing executive of the defendant Coast Insulating Products, and during all of said times actively participated as such in the illegal acts complained of herein.

11.

Plaintiffs are unaware of the true names or capacities of the defendants First Doe, Second Doe, Third Doe, and Fourth Doe, and therefore sue said defendants by such fictitious names and pray that their names and capacities, when ascertained, may be incorporated herein by appropriate amendments to this complaint.

12.

Acoustical Contractors Association of Southern California, Inc. (hereinafter referred to as The Association) is a corporation organized and existing under and by virtue of the laws of the State of California, having its principal place of business in the City and County of Los Angeles, State of California, and has as its members all of the foregoing named defendants.

13.

In addition to the foregoing capacities and since December 10, 1951 (the date upon which the defendant "Acoustical Contractors Association of Southern California, Inc." was incorporated), the

uary 1, 1952, been sold exclusively by all manufacturers to a limited number of tile contractors in the Los Angeles competitive area and elsewhere in the State of California. In the Los Angeles competitive area said tile has been sold only to members of the defendant, The Association, excepting the period of January 1, 1952, to in or about March, 1952, when Flintkote sold such tile to plaintiffs, as will be hereinafter described.

V.

Violations of Law

16.

For some time prior to the date of the filing of this complaint and continuously since prior to January 1, 1951, the defendants herein, with the exception of Flintkote, well-knowing all of the foregoing facts have been engaged in a combination and conspiracy to restrain and to monopolize trade and commerce in acoustical tile in violation of the Act of July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies." The general plan and purpose of said combination and conspiracy was that said defendants would eliminate competition among themselves and monopolize the sale and installation of acoustical tile by agreeing with each other:

1. To maintain and adhere to non-competitive prices to be charged and non-competitive terms and conditions of sale allowed various types of purchasers for acoustical tile and the installation thereof.

2. To refrain from competing with each other in the sale and installation of acoustical tile.

3. To allocate the sale and installation of acoustical tile among members of the defendant, The Association, in accordance with an allocation system and agreement among such members of The Association rather than upon the basis of open and competitive bids and negotiations.

4. To exclude non-member acoustical tile contractors from their legal right to compete in the purchase, sale, and installation of acoustical tile in Los Angeles and surrounding areas by use of the following means among others:

(a) By boycotting, threatening to boycott, and otherwise coercing manufacturers of acoustical tile to limit the sale of their product to members of the defendant, The Association, in areas where said members are located or do business.

(b) By concertedly entering inordinately low bids for jobs on which is was ascertained by said defendants that a non-member acoustical tile contractor was bidding or negotiating.

5. By associating and acting concertedly with one another throughout the period named herein for the purpose of effectuating the objects and purposes set forth hereinabove.

VI.

Acts Done in Furtherance of the Illegal Restraints and Monopolies

17.

At all times since prior to January 1, 1951, defendants have done and performed each and all of the acts necessary to accomplish the objects and purposes of the conspiracy combination, and agreements hereinbefore set out in paragraph 16 above.

VII.

Effect of Defendants' Illegal Acts Upon Plaintiffs' Business

18.

The unlawful restraints, monopolies, contracts, understandings, combinations and conspiracies of the defendants as herein described have had and now have, as intended by the defendants, the following injurious effects upon plaintiffs' property and the operation of their said acoustical tile contracting business in the City and County of Los Angeles, State of California, and in the City and County of San Bernardino, State of California:

(a) Prior to January 1, 1952, plaintiffs entered into an agreement with the defendant Flintkote for a continuous supply of a complete line of acoustical tile products manufactured and sold by said defendant. In reliance upon said agreement plaintiffs lease warehouses and office accommodations in the City and County of Los Angeles and in the City

and County of San Bernardino, all in the State of California, in which to conduct and carry on an acoustical tile contracting business. For many years prior to January 1, 1952, the defendant Flintkote had supplied and has continued to supply its acoustical tile products to two or more members of the defendant, The Association, doing business in the County of Los Angeles and elsewhere in the State of California. Plaintiffs commenced receiving regular shipments of acoustical tile from the defendant Flintkote, in accordance with said agreement, in or about January 1, 1952, and continued to receive said shipments and place orders for additional shipments until in or about March, 1952. During this period of approximately three months or more plaintiffs were successful in establishing a profitable, substantial, and constantly expanding acoustical tile contracting business in Los Angeles and San Bernardino Counties in the State of California, and obtained and performed a large number of contracts to supply and install acoustical tile in said areas in competition with the defendant tile contractors named herein.

In or about March, 1952, and solely because of the active and successful competition of plaintiffs with members of the defendant, The Association, and the effect of such competition on the illegal, non-competitive price fixing policies and activities of said members, the defendant Flintkote was induced to terminate its agreement to supply plaintiffs with acoustical tile products by reason and

because of the concerted action and coercion exerted upon said defendant by members of the defendant, The Association, in the form of threats to boycott Flintkote products in the Los Angeles area and elsewhere in the State of California by said defendants in the event Flintkote continued supplying said products to plaintiffs. As a sole and direct result of said concerted action, threats of boycott, and coercion Flintkote did in fact, in or about March, 1952, refuse to accept further orders for acoustical tile products from plaintiffs and did terminate its agreement with plaintiffs. As a sole and direct result of said acts of the defendants, plaintiffs have been damaged in their property and business as follows:

(1) Members of the defendant, The Association, have by their said acts monopolized all sources of supply of acoustical tile available for use in Los Angeles County and elsewhere in the State of California to the exclusion of plaintiffs herein as a result of which plaintiffs have sustained and will sustain and will continue to sustain the following damages:

(aa) Having been so deprived of their only available source of supply with which to carry on their business plaintiffs have been, are, and will continue to be unable to bid upon or compete with defendants in connection with any substantial amount of business whereby and because of which fact plaintiffs' business and their ability to carry on the same has been drastically and substantially reduced.

(bb) By reason of being deprived of their source of supply, the good will created by plaintiffs over a period of years of association with building contractors (who award contracts to acoustical tile contractors) has been and is being destroyed at a progressively rapid rate;

(cc) Plaintiffs have, as a result of the illegal acts complained of herein, been compelled to vacate their business facilities in San Bernardino County, State of California, upon which they must and do, under the terms of a binding lease, continue to pay substantial rent;

(dd) When the limited inventory of acoustical tile now belonging to plaintiffs is consumed, plaintiffs will be compelled to terminate and discontinue their business altogether.

(ee) By reason of all of the foregoing facts, plaintiffs have been damaged in a sum of not less than $75,000.00.

(ff) By reason of defendants' use of a member of defendant, The Association, as a "fighting company" in connection with acoustical tile contracts in which plaintiffs were interested, plaintiffs have been and will continue to be deprived of such business which would otherwise have gone to them; that is to say, the defendants have sought out and inquired concerning those acoustical contracting jobs in which plaintiffs have submitted a bid or for which they were negotiating and have delegated one of their number to submit an inordinately and

arbitrarily low bid in such instances for the sole purpose of depriving plaintiffs of business and profits which they would otherwise have received and for the ultimate purpose of driving plaintiffs out of business entirely.

19.

Unless the defendants, and each of them, are restrained and enjoined from continuing their unlawful practices herein alleged, plaintiffs will continue to suffer substantial additional losses of profits and other damages hereinbefore set forth, and, therefore, plaintiffs will at the appropriate time ask permission of this Honorable Court to supplement the instant complaint to cover damages suffered subsequent to the filing of this complaint.

Wherefore, plaintiffs pray:

(1) That the conspiracy, conspiracies, combination, combinations, contracts, and agreements hereinbefore described and the acts taken to effectuate their purposes be declared by this Court to be illegal and in violation of the Sherman Antitrust Act, Sections 1 and 2 (15 U.S.C.A., Secs. 1 and 2);

(2) For judgment against the defendants, and each of them, and in favor of the plaintiffs in the sum of $225,000.00, being three-fold the damages sustained by plaintiffs as a result of the matters complained of herein;

(3) For judgment against the defendants, and each of them, for costs of suit and reasonable at-

torneys' fees pursuant to the laws of the United States as provided in such cases;

(4) That the defendants, and each of them, be enjoined from continuing each and all of the unlawful acts and practices herein set forth; and

(5) For such other and further relief as to the Court shall seem just and equitable.

/s/ ALFRED C. ACKERSON,
Attorney for Plaintiffs.

Plaintiffs hereby demand a jury trial of the issues involved in this action.

Duly verified.

Amended March 23, 1953.

[Endorsed]: Filed July 21, 1952.

[Title of District Court and Cause.]

FIRST AMENDED COMPLAINT
(Under Sherman Antitrust Act)

The above-named plaintiffs complain of the above-named defendants, and each of them, and allege as follows:

I.

Jurisdiction

1.

The causes of action in this complaint arise under thelaws for the protection of trade and commerce

against restraints and monopolies, and more particularly under the provisions of law contained in Title 15 of the United States Code, including Sections 1, 2, and 7 of the Act of Congress known as the Sherman Act, and Sections 4, 5, 12 and 16 of the Act of Congress known as the Clayton Act (15 U.S.C.A. secs. 1, 2, 15, 16, 22, 26; 26 Stat. 209, 26 Stat. 210, 38 Stat. 731, 38 Stat. 736, 38 Stat. 737).

2.

The purpose of this action is to recover threefold the damages sustained by plaintiffs, plus reasonable attorney's fees and costs of suit, caused by defendants' illegal, monopolistic practices and restraints of trade and commerce, particularly as affecting plaintiffs, all as more fully set forth herein, for an injunction to restrain said illegal acts in the future, and for such other and further relief to which plaintiffs may be entitled.

II.

Plaintiffs

3.

The plaintiffs, Walter R. Waldron and Elmer Lysfjord, are residents of the City and County of Los Angeles, State of California, and since in or about January, 1952, have been engaged in the business of rendering an acoustical tile contracting service under the fictitious firm name and style of "aabeta co." and have maintained principal offices and conducted said business in the City and County

of Los Angeles, California, and in the City and County of San Bernardino, California.

III.

Defendants

4.

The defendants, L. D. Reeder Company of San Diego, R. E. Howard Company, the Harold E. Shugart Company, Inc., R. W. Downer Company, Coast Insulating Products, A. D. Hoppe, Paul H. Denton Co., and Acoustics, Inc., during all of the times named herein have been and now are engaged in the business of purchasing, distributing, installing, and contracting for the installation and sale of acoustical tile in the State of California, and each said defendant conducts said business in the City and County of Los Angeles, State of California, and regularly maintains an office and principal place of doing business in said City, County, and State.

5.

L. D. Reeder was, during all of the times mentioned herein, an officer, director and managing executive of the defendant, L. D. Reeder Company of San Diego, and during all of said times actively participated as such in the illegal acts complained of herein.

6.

R. E. Howard was, during all of the times mentioned herein, an officer, director, and managing executive of the defendant, R. E. Howard Company,

and during all of said times actively participated as such in the illegal acts complained of herein.

7.

G. H. Morris was, during all of the times mentioned herein, an officer, director, and managing executive of the defendant The Harold E. Shugart Company, Inc., and during all of said times actively participated as such in the illegal acts complained of herein.

8.

Roy Downer, Jr., was, during all of the times mentioned herein, and officer, director and managing executive of the defendant R. W. Downer Company, and during all of said times actively participated as such in the illegal acts complained of herein.

9.

Charles L. Newport was, during all of the times mentioned herein, an officer, director and managing executive of the defendant Coast Insulating Products, and during all of said times actively participated as such in the illegal acts complained of herein.

10.

Gustave Krause was, during all of the times mentioned herein, an officer, director, and managing executive of the defendant Coast Insulating Products, and during all of said times actively participated as such in the illegal acts complained of herein.

11.

Paul H. Denton was, during all of the times mentioned herein, an officer, director, and managing ex-

ecutive of the defendant Paul H. Denton Co., and during all of said times actively participated as such in the illegal acts complained of herein.

12.

Carroll Duncan was, during all of the times mentioned herein, an officer, director, and managing executive of the defendant Acoustics, Inc., and during all of said times actively participated as such in the illegal acts complained of herein.

13.

Plaintiffs are unaware of the true names or capacities of the defendants First Doe, Second Doe, Third Doe, and Fourth Doe, and therefore sue said defendants by such fictitious names and pray that their names and capacities, when ascertained, may be incorporated herein by appropriate amendments to this complaint.

14.

Acoustical Contractors Association of Southern California, Inc. (hereinafter referred to as The Association) is a corporation organized and existing under and by virtue of the laws of the State of California, having its principal place of business in the City and County of Los Angeles, State of California, and has as its members all of the defendants named in paragraph 4 hereinabove.

15.

In addition to the foregoing capacities and since December 10, 1951 (the date upon which the defendant "Acoustical Contractors Association of

Southern California, Inc." was incorporated), the defendants Paul H. Denton, Roy Downer, Jr., and Charles L. Newport have been directors and officers of said defendant Association and have actively participated as such in the illegal acts and purposes hereinafter complained of. The defendants L. D. Reeder Company of San Diego, R. E. Howard Company, The Harold E. Shugart Company, Inc., R. E. Downer Company, Coast Insulating Products, Paul H. Denton Co., and Acoustics, Inc., named and described as defendants hereinabove, are each corporations organized and existing under and pursuant to the laws of California.

16.

The Flintkote Company (hereinafter referred to as Flintkote) is a corporation organized and existing under and by virtue of the laws of the State of Massachusetts, and is regularly authorized to do business and does in fact conduct its business in the City and County of Los Angeles and State of California, and through parent subsidiary or associated companies conducts business in various other states of the United States and in the Territory of Hawaii. Flintkote is either directly or through parent subsidiary or associated companies engaged in the manufacture of acoustical tile in the Territory of Hawaii and elsewhere outside the State of California, and is so engaged in the sale of said acoustical tile to acoustical tile contractors in the State of California (including the defendants hereinabove named) and

other acoustical tile contractors in California and in other states throughout the United States.

IV.

Definitions

17.

As used herein the following terms shall have the following meaning, to wit:

"Acoustical tile" is a substance made of cane or wood fibre material made into twelve-inch perforated squares of varying thicknesses or other sizes, which has been tested and has received a rating and listing by the Acoustical Materials Association, (hereinafter referred to as A. M. A.), as having definite and ascertained sound absorbing qualities.

"A. M. A." is an association with principal offices in the City and State of New York having as its members, among others, all of the manufacturers of acoustical tile which distribute said product in the State of California.

"Manufacturer" is a manufacturer of acoustical tile which sells or distributes such acoustical tile in the State of California.

"Acoustical tile contractor" is a person, firm, or corporation engaged in the business of buying acoustical tile for sale and installation in public and private building structures pursuant to public bids or negotiations with general contractors or others

engaged in erecting public or private building structures.

"Public building" is a building or other structure which is financed in whole or in part by money contributed by the Federal, State, or local governments.

"Private building" is a building or other structure which is erected and financed by private funds as distinguished from public funds.

V.

Interstate Commerce

18.

Acoustical tile is used as a sound absorbing material in building construction. For many years prior to the filing of the complaint herein architects, builders, and Federal and local government agencies have required, pursuant to established building specifications, that only acoustical tile tested, rated, and listed by A. M. A. as having certain sound dampening or absorbing qualities shall be acceptable for use in more than 90% of all public and private building in the Counties of Los Angeles and San Bernardino in the State of California and elsewhere throughout the United States. All manufacturers selling and distributing acoustical tile having an A. M. A. listing and rating in the Counties of Los Angeles and San Bernardino, California, and in the State of California have, during all of the times mentioned herein, sold such acoustical tile directly

to only a limited number of tile contractors in said areas at identical and substantially lower prices than such tile can be obtained or purchased from sources other than manufacturers and during all said times have limited the sale of such tile at such prices, in the Counties of Los Angeles and San Bernardino, State of California, to only the defendant tile contractors named herein, excepting only during the period of approximately January 1, 1952, to in or about March, 1952, during which time Flintkote sold such tile to plaintiffs as will be hereinafter described. In excess of 90% of all acoustical tile sold and distributed for use in private and public building structures in the State of California is manufactured by a limited number of manufacturers in states other than the State of California and in the Territory of Hawaii. Of the limited number of manufacturers of acceptable and competitive acoustical tile under the foregoing conditions the defendant Flintkote manufactures in the Territory of Hawaii the acoustical tile which it sells to acoustical tile contractors in the State of California and elsewhere throughout the United States. Such tile is delivered by boat from the Territory of Hawaii, consigned directly to the purchasing tile contractor. All or substantially all of the other acoustical tile sold in the State of California and in the Los Angeles and surrounding areas is manufactured by manufacturers in states other than the State of California, and is similarly consigned via rail shipments to acoustical tile contractors within the State of California.

Of the manufacturers of acoustical tile which is competitive by virtue of having been tested, rated and listed by A. M. A. and which for that reason will meet and comply with the specifications demanded for acoustical tile in public and private construction projects in the Counties of Los Angeles and San Bernardino, State of California, the defendant, Flintkote, has in the past supplied such tile on a competitive basis in said areas only to two or more members of the defendant, The Association, and for a limited period to the plaintiffs herein. All other manufacturers selling such acoustical tile likewise sell their product in the Counties of Los Angeles and San Bernardino, State of California, only to one or more members of the defendant, The Association, at prices and upon conditions of sale which will permit the purchaser to compete in the acoustical tile contracting business in said areas; that is to say, that each manufacturer doing business in said areas sells its product at the prices and upon the other terms and conditions of sale aforesaid to only a limited number of acoustical tile contractors, all of whom are members of the defendant, The Association, and each said manufacturer makes its product available to such tile contractors at identical prices and upon substantially identical terms and other conditions of sale.

In or about the latter part of 1951 the defendant Flintkote after lengthy investigation and negotiations entered into an agreement with plaintiffs

to supply plaintiffs with acoustical tile manufactured by Flintkote in the Territory of Hawaii on a continuing basis and at prices and upon other terms and conditions of sale identical with those upon which Flintkote was and is supplying such tile to other acoustical tile contractors in the State of California. In pursuance of and in reliance upon said agreement, plaintiffs terminated lucrative positions and employment in the acoustical tile contracting business in the Counties of Los Angeles and San Bernardino, State of California, and elsewhere in said State, and obtained and leased warehouses and office space in both said areas and locations for the purpose of conducting an acoustical tile contracting business in said areas utilizing the promised and agreed continuing source of acoustical tile manufactured by the defendant Flintkote. That in accordance with said agreement between Flintkote and the plaintiffs herein, orders were placed with the defendant Flintkote for acoustical tile and were delivered by Flintkote to plaintiffs at and consigned to plaintiff's warehouses in the City of Los Angeles and in the City of San Bernardino, State of California, at the prices and under the other terms and conditions of sale aforesaid. Immediately upon the execution of said agreement between the defendant Flintkote and the plaintiffs herein, plaintiffs, commencing in or about the latter part of 1951, advertised, sold, purchased, warehoused, and installed acoustical tile manufactured by Flintkote throughout said area, all with

the full knowledge, consent, and agreement of the defendant Flintkote.

VI.

Violations of Law

19.

Beginning at an exact date unknown to plaintiff's, but prior to the year 1951, and continuously thereafter up to and including the date of the filing of the complaint herein, the defendants, (well-knowing all of the facts hereinbefore alleged), have conspired to restrain and have restrained trade and commerce in the interstate and foreign distribution and sale of acoustical tile in the Counties of Los Angeles and San Bernardino, State of California, and in the State of California and elsewhere throughout the United States, by contracting, combining, and conspiring with each other and with other manufacturers of acoustical tile in restraint of such trade and commerce, contrary to Section 1 of the Act of Congress commonly known as the Sherman Act (26 Stat. 209; 50 Stat. 693; 15 U.S.C.A., Sec. 1), and have thereby substantially lessened, limited, and destroyed competition in said trade and commerce and have prevented plaintiffs from receiving acoustical tile with which to compete in said trade and commerce.

Commencing at an exact date unknown to plaintiffs but prior to the year 1951 and continuously thereafter up to and including the date of the filing of the complaint herein, the defendants well knowing all of the facts hereinbefore alleged, have at-

tempted to monopolize and have monopolized the trade and commerce in interstate and foreign distribution and sale of acoustical tile in the Counties of Los Angeles and San Bernardino, State of California, and in the State of California and elsewhere throughout the United States, contrary to Section 2 of the Act of Congress commonly known as the Sherman Act (26 Stat. 209; 50 Stat. 693; 15 U.S.C.A. Sec. 2).

Said combinations, agreements, conspiracies, monopolies, and attempts to monopolize have, during all of said period of time tended to restrain and monopolize and have in fact restrained and monopolized trade and commerce in acoustical tile in interstate and foreign commerce.

VII.

The Objects and Purposes of the Illegal Restraints and Monopolies

20.

Among the objects and purposes of the illegal restraints and monopolies alleged herein were and are the following:

a. To maintain and adhere to and perpetuate non-competitive prices and terms and conditions of purchase of acoustical tile from manufacturers by acoustical tile contractors in the Counties of Los Angeles and San Bernardino and throughout the State of California, and to protect and perpetuate the existing non-competitive price fixing and business allocation scheme and device and agreement

existing among acoustical tile contractors in said areas.

b. To eliminate all or substantially all competition in the sale and installation of acoustical tile in public and private construction works in the Counties of Los Angeles and San Bernardino and elsewhere in the State of California.

c. To preserve and perpetuate the existing agreement and plan adhered to by acoustical tile contractors whereby the sale and installation of acoustical tile mentioned and described in paragraphs a and b above would be allocated among members of the defendant, The Association, at non-competitive exorbitant and high fixed prices and upon other fixed and non-competitive conditions of sale rather than pursuant to open and competitive bids and negotiations among all acoustical tile contractors doing business in said areas.

d. To exclude competing acoustical tile contractors from their legal right to compete in the purchase, sale, and installation of acoustical tile, in Los Angeles and surrounding areas, with the defendant acoustical tile contractors named herein.

e. To obtain a practical control and monopoly over the purchase, sale, and installation of acoustical tile in public and private buildings in the Counties of Los Angeles and San Bernardino in the State of California and elsewhere in said State.

f. To obtain maximum exorbitant and non-competitive profits in the sale and installation of

acoustical tile for use in public and private buildings in the Counties of Los Angeles and San Bernardino, State of California, and elsewhere in the State of California by the defendant acoustical tile contractors named herein.

g. To deprive the public generally of the benefits of a competitive market in the expenditure of public and private funds for schools, hospitals, offices, and other types of public and private building construction.

VIII.

Acts Done in Furtherance of the Illegal Restraints and Monopolies

21.

In furtherance of said illegal restraints and monopolies and to accomplish the aforesaid objects and purposes of the same, all of the defendants, and each of them, have during the times mentioned herein and since prior to the year 1951 done and caused to be done each of the following acts among others:

a. Conspired and agreed among themselves and with each other to restrain interstate and foreign trade and commerce in the sale and installation of acoustical tile in the counties of Los Angeles and San Bernardino in the State of California and elsewhere in said State and to maintain and perpetuate a monopoly of said trade and commerce in said areas in the defendant acoustical tile contractors named herein.

b. Conspired and agreed among themselves and with the defendant Flintkote to limit the sale and installation of acoustical tile in public and private buildings to the defendant acoustical tile contractors named herein in areas where said contractors are doing business to the exclusion of all competing contractors including plaintiffs.

c. Concertedly entered inordinately low bids for the sale and installation of acoustical tile in public and private buildings where it was ascertained by said defendants that a competing acoustical tile contractor was bidding or negotiating for said work or contract.

d. Allocated among the defendant acoustical tile contractors contracts for the installation of acoustical tile in schools, hospitals, and other public and private buildings pursuant to a collusive agreement among members of the defendant, The Association, whereby said members decided in advance of the filing of bids which member was to be the successful bidder and whereby the other members arbitrarily bid a higher figure to assure this intended result.

e. By the means described in subparagraph d above, the defendant tile contractors named herein arbitrarily, collusively, and substantially increased the cost of public and private building projects to their own exclusive benefit and profit.

f. Precluded any substantial competition (including the competition of plaintiffs) in the sale and

installation of acoustical tile in the Counties of Los Angeles and San Bernardino and elsewhere in the State of California by monopolizing all available competitive sources of acoustical tile sold in said areas.

g. The defendant acoustical tile contractors agreed among themselves to charge and maintain fixed prices for the sale and installation of acoustical tile.

h. By agreement among the defendant acoustical tile contractors, said defendants compelled the low bidder among the defendants on a particular job to withdraw such low bid in favor of a higher bid by another defendant acoustical tile contractor.

i. Agreed among themselves and with the defendant Flintkote to destroy the plaintiff's acoustical tile business for the sole purpose and with the sole intent of preventing plaintiffs from competing in the acoustical tile contracting business in the Counties of Los Angeles and San Bernardino, State of California, or in other areas in which the defendant acoustical tile contractors conducted such business for the purpose and with the result of thereby preserving the non-competitive price fixing and allocation scheme among the defendant acoustical tile contractors in said areas.

j. The defendants, and each of them, including the defendant Flintkote, agreed among themselves and with each other to terminate the supply of acoustical tile products to plaintiffs and pursuant

to said agreement with Flintkote did in fact terminate said source of supply of acoustical tile in violation of the agreement between the defendant Flintkote and plaintiffs for the sole purpose and effect of preventing plaintiffs from competing with said defendants, and to protect and perpetuate the existing monopoly in the sale and installation of acoustical tile theretofore existing among the members of the defendant, The Association, and have at all times since March, 1952, and in accordance with said conspiracy and agreement continued to prevent plaintiffs from obtaining an adequate competitive source of acoustical tile for sale and installation in the areas in which the defendant acoustical tile contractors conducted such business.

k. The defendant Flintkote entered into said agreement with the other defendants named herein with full knowledge of and for the express purpose and with the inevitable effect of foreclosing plaintiff's competition contrary to and in violation of defendant Flintkote's contract and agreement with plaintiffs as aforesaid. That in pursuance of Flintkote's agreement with the other defendants named herein, and for no other reason, Flintkote, in accordance with the demands and coercion exercised by the members of the defendant, The Association, has since March, 1952, and for the purposes aforesaid, refused to supply the plaintiffs with competitive tile with which to conduct their said business and have thereby and through agreement with said other named defendants destroyed plaintiffs' busi-

ness and have thus knowingly and intentionally aided and perpetuated the conspiracy of the defendant tile contractors named herein.

IX.

Effect of Defendants' Illegal Acts Upon Plaintiffs' Business

22.

The unlawful restraints, monopolies, attempts to monopolize, contracts, understandings, combinations and conspiracies of the defendants herein described have had and now have, as intended by the defendants, the following injurious effects upon plaintiffs' property and business:

(a) Members of the defendant, The Association, have by their said acts monopolized all sources of A. M. A. acoustical tile available for use in the tile contracting business in Los Angeles County and elsewhere in the State of California to the exclusion of plaintiffs herein as a result of which plaintiffs have sustained and will continue to sustain the following damages:

(aa) Having been so deprived of their only available source of supply of competitive acoustical tile with which to carry on their business, plaintiffs have been, are, and will continue to be unable to bid upon or compete with defendants in connection with any substantial amount of business whereby and because of which fact plaintiffs' business and their ability to carry on the same has been

drastically and substantially reduced, and will, ultimately be destroyed;

(bb) By reason of being deprived of the only source of supply of competitive acoustical tile, the good will created by plaintiffs over a period of years of association with building contractors (who award contracts to acoustical tile contractors) has been and is being destroyed at a progressively rapid rate;

(cc) Plaintiffs have, as a result of the illegal acts complained of herein, been compelled to vacate their business facilities in San Bernardino County, State of California, upon which they must and do, under the terms of a binding lease, continue to pay substantial rent;

(dd) The limited inventory of competitive A. M. A. acoustical tile heretofore sold to plaintiffs at competitive prices by the defendant Flintkote has been consumed. Plaintiffs are, therefore, without acoustical tile with which to carry on their said business on a competitive basis with the defendants named herein;

(ee) By reason of the conspiracy and agreement among the defendant acoustical tile contractors, to monopolize the acoustical tile contracting business in the Counties of Los Angeles and San Bernardino, California, and elsewhere in California and to foreclose and prevent competition therein and by reason of their demands that the defendant Flintkote participate therein and Flintkote's agreement to par-

ticipate in and adhere to said conspiracy and agreement, plaintiffs have been deprived of the only available source of competitive acoustical tile which would enable them to continue their business in competition with the defendants herein, and as a result thereof have been compelled to cease all active substantial competition in the acoustical tile contracting business with the consequent loss of good will, capital investment, and actual and potential profits, which, but for the acts of the defendants herein, would have resulted in large, substantial, and continuing profits to plaintiffs.

(ff) By reason of all of the foregoing facts plaintiffs have been damaged in the sum of not less than $100,000 to the date of the filing of this First Amended Complaint.

23.

Unless the defendants, and each of them, are restrained and enjoined from continuing their unlawful practices herein alleged, plaintiffs will continue to suffer loss of profits, destruction of good will, and diminution of capital investment, and will be and now are in imminent danger of having their entire acoustical tile contracting business destroyed.

Wherefore, plaintiffs pray:

(1) That the conspiracy, conspiracies, combination, combinations, contracts, and agreements hereinbefore described and the acts taken to effectuate their purposes be declared by this Court to be illegal and in violation of the Sherman Antitrust Act, Sections 1 and 2 (15 U.S.C.A. Secs. 1 and 2);

(2) For judgment against the defendants, and each of them, and in favor of the plaintiffs, for damages.

(3) For judgment against the defendants, and each of them, for costs of suit and reasonable attorney's fees pursuant to the laws of the United States as provided in such cases;

(4) That the defendants, and each of them, be restrained and enjoined, pending the final adjudication of this cause, and thereafter be permanently restrained and enjoined, from continuing each and all of the unlawful practices set forth herein;

(5) That the defendant Flintkote, its officers, and agents be enjoined from agreeing with the other defendants named herein or with any of them, or with any other acoustical tile contractor to refuse to sell acoustical tile to plaintiffs for installation and sale in the Counties of Los Angeles and San Bernardino, in the State of California;

(6) That the defendant Flintkote, its officers and agents and employees be enjoined from in any way way agreeing with the defendant members of the defendant Association to aid, assist or otherwise to perpetuate the purposes or objects of the conspiracies, combinations and monopolies, complained of herein;

(7) That pending an adjudication of the issues herein, the defendant Flintkote be required to reinstate and fulfill its agreement and contract with the plaintiffs, and that thereafter Flintkote be re-

quired to continue said contract and agreement so long as there exists no reason under sound business principles and practices for terminating the same.

(8) For such other and further relief as to the Court shall seem just and equitable.

/s/ ALFRED C. ACKERSON,
Attorney for Plaintiffs.

Plaintiffs hereby demand a jury trial of the issues involved in this action.

Duly verfied.

Lodged January 28, 1953.

[Endorsed]: Filed March 23, 1953.

[Title of District Court and Cause.]

ANSWER OF THE FLINTKOTE COMPANY TO FIRST AMENDED COMPLAINT

Defendant The Flintkote Company (hereinafter sometimes called "Flintkote") for answer to the first amended complaint on file herein, admits, denies and avers as follows:

1. Answering paragraph 1 of the first amended complaint, defendant Flintkote admits that plaintiffs have apparently attempted to allege a cause or causes of action under the acts and sections alleged; defendant Flintkote denies that any such cause or causes of action exist against it; except to the extent

admitted and denied above, defendant Flintkote states that it is without knowledge or information sufficient to form a belief as to the truth of each and every of the averments in said paragraph 1.

2. Answering paragraph 2 of the first amended complaint, defendant Flintkote admits that the relief prayed in the first amended complaint is substantially as described by the averments in said paragraph 2; defendant Flintkote denies that it was involved in any illegal or monopolistic practices or restraints of trade or commerce or any other acts or courses of conduct which might have injured plaintiffs or which might entitle plaintiffs to any injunction or damages or any other relief against defendant Flintkote; except as admitted and denied above, defendant Flintkote states that it is without knowledge or information sufficient to form a belief as to the truth of each and every of the averments in said paragraph 2.

3. Answering the allegations in paragraph 3 of the first amended complaint, defendant Flintkote admits that plaintiffs have been engaged in the acoustical contracting business under the name and style of "aabeta co." and in the early part of 1952 maintained a place of business in the City of San Bernardino, County of San Bernardino, California; except as admitted above, defendant Flintkote states that it is without knowledge or information sufficient to form a belief as to the truth of each and every of the averments in said paragraph 3.

4. Answering paragraph 4 of the first amended complaint, defendant Flintkote admits that the defendants R. E. Howard Company, Coast Insulating Products, A. D. Hoppe, and Acoustics, Inc., were all engaged in the acoustical contracting business at the times mentioned; except as admitted above, defendant Flintkote states that it is without knowledge or information sufficient to form a belief as to the truth of each and every of the averments in said paragraph 4.

5. Answering paragraphs 5 through 15 of the first amended complaint, and each of them, defendant Flintkote states that it is without knowledge or information sufficient to form a belief as to the truth of each and every of the averments in said paragraphs 5 through 15, inclusive, or any of them.

6. Answering paragraph 16 of the first amended complaint, defendant Flintkote admits and avers that: The Flintkote Company is a Massachusetts corporation; it is authorized to and does do business in the State of California; it maintains a place of business in the City of Vernon, County of Los Angeles, California; it conducts business throughout the United States; it manufactures acoustical tile in Hilo, Hawaii, Territory of Hawaii; it sells acoustical tile to some of the defendants herein, to wit, R. E. Howard Company, Coast Insulating Products, and Acoustics, Inc.; it sells acoustical tile to other acoustical contractors in San Diego, San Francisco, Sacramento, and Bakersfield, California and throughout the eleven Western States of the United States.

Except as admitted and averred above, defendant Flintkote denies each and all of the averments of said paragraph 16.

7. Answering paragraph 17, of the first amended complaint in which certain terms are given certain definitions, defendant Flintkote avers that many of the definitions are unnecessary, inappropriate, erroneous, ambiguous and/or unintelligible, and denies that the terms so defined are used throughout the complaint according to the definitions in said paragraph 17; defendant Flintkote admits and avers that the Pioneer Division of The Flintkote Company is a member of the Acoustical Materials Association and that the Acoustical Materials Association maintains offices in the City of New York, New York; except as admitted, averred and denied above, defendant Flintkote states that it is without knowledge or information sufficient to form a belief as to the truth of each and every of the averments in said paragraph 17.

8. Answering paragraph 18 of the first amended complaint, defendant Flintkote admits and avers that acoustical tile is used as a sound absorbing material in buildings; defendant Flintkote now sells its accoustical tile to three of the defendants herein, Acoustics, Inc., Coast Insulating Products, and R. E. Howard Company, and formerly sold its acoustical tile to three of the other defendants herein, A. D. Hoppe, Paul H. Denton Co., and L. D. Reeder (sued herein as L. E. Reeder), and

to plaintiffs herein; membership in the defendant Acoustical Contractors Association of Southern California, Inc., in no way affects defendant Flintkote's choice of accounts; defendant Flintkote sells its acoustical tile pursuant to prices and terms set forth in price lists which are applicable to all purchasers and which are published and revised from time to time; defendant Flintkote ships its acoustical tile from Hawaii, the place of manufacture, to continental United States by water carriers, and thereafter the acoustical tile is transported by truck or rail shipment to the warehouses or job-sites of the purchasers, occasionally stopping at Flintkote warehouses in continental United States; in general, acoustical tile is shipped from Hawaii only after orders therefor have been secured from purchasers in continental United States; in the latter part of 1951, defendant Flintkote accepted from plaintiffs an order for acoustical tile to be delivered in San Bernardino and to be used in the San Bernardino-Riverside area; in January, 1952, defendant Flintkote delivered the tile so ordered to plaintiffs at 901 N. Waterman Street, San Bernardino, California; after plaintiffs had been informed that no further orders from them would be accepted, certain small lots of acoustical tile were delivered to them at 7302 So. Atlantic Avenue, Bell, California. Except as admitted and averred above, defendant Flintkote denies that any contract or agreement ever existed between it and plaintiffs; denies that it contracted or agreed to supply plaintiffs with

acoustical tile on a continuing basis, or any basis, or at all; denies that it contracted or agreed to supply acoustical tile to plaintiffs in any specific quantity, or any quantity, or at all; denies that it contracted or agreed to supply acoustical tile to plaintiffs during any specific period of time, or any period of time, or at all. Except as admitted, averred, and denied above, defendant Flintkote denies each and all of the averments of said paragraph 18 to the extent that they refer to defendant Flinkote. Except as admitted, averred, and denied above, defendant Flintkote states that it is without knowledge or information sufficient to form a belief as to the truth of each and every of the averments in said paragraph 18.

9. Answering paragraphs 19 and 20 of the first amended complaint, and each of them, defendant Flintkote denies each and all of the averments of said paragraphs 19 and 20 and each of them to the extent that they refer to defendant Flintkote; except as denied above, defendant Flintkote states that it is without knowledge or information sufficient to form a belief as to the truth of each and every of the averments in said paragraphs 19 and 20 and each of them.

10. Answering paragraph 21 of the first amended complaint, defendant Flintkote admits and avers that, except to the extent admitted and averred in paragraph 8 of this answer, it has refused and now refuses and will continue to refuse to supply

plaintiffs with accoustical tile; except as admitted and averred above, defendant Flintkote denies each and all of the averments of said paragraph 21 to the extent that they refer to defendant Flintkote; except as admitted, averred, and denied above, defendant Flintkote states that it is without knowledge or information sufficient to form a belief as to the truth of each and every of the averments in said paragraph 21.

11. Answering paragraphs 22 and 23 of the first amended complaint, and each of them, defendant Flintkote denies each and all of the averments thereof to the extent that they refer to defendant Flintkote; except as denied above, defendant Flintkote states that it is without knowledge or information sufficient to form a belief as to the truth of each and every of the averments in said paragraphs 22 and 23 and each of them.

First Affirmative Defense

For a first affirmative defense, defendant Flintkote avers as follows:

1. Defendant Flintkote sold to plaintiffs one carload of acoustical tile, per the then current price list published by defendant Flintkote, and delivered the same to plaintiffs at San Bernardino, California, for use in the San Bernardino-Riverside area.

2. It was expressly understood by both plaintiffs and defendant Flintkote that a condition of such

sale was that plaintiffs would use the tile so sold and delivered in the San Bernardino-Riverside area only, and would not engage in the acoustical contracting business in the Los Angeles Metropolitan area.

3. Subsequent to the making of the sale and delivery averred in paragraph 1 of this first affirmative defense, it came to the attention of defendant Flintkote that, contrary to and in violation of the express condition of sale averred in paragraph 2 of this first affirmative defense, plaintiffs had established a place of business in Bell, California, and were engaged and engaging in the acoustical contracting business in the Los Angeles Metropolitan area.

4. Upon discovering the breach, violation and disregard by plaintiffs of the express condition of sale, as averred in paragraph 3 of this first affirmative defense, and because of said breach, violation and disregard, defendant Flintkote informed plaintiffs that it would not accept further orders for acoustical tile from plaintiffs.

5. Thereafter, solely out of courtesy to plaintiffs and not because of any obligation upon it to do so, defendant Flintkote advised plaintiffs that it would accept orders from plaintiffs for sufficient acoustical tile to enable plaintiffs to perform under contracts for the installation of Flintkote tile which had theretofore been awarded to plaintiffs; and defendant Flintkote thereafter in fact accepted or-

ders and delivered small lots of acoustical tile to plaintiffs at their place of business in Bell, California.

6. Any injury or damage which plaintiffs may have heretofore suffered, or be suffering, or suffer in the future by reason of their inability to obtain a suitable source of supply of acoustical tile with which to conduct their business is, has been, and will be proximately caused by the breach, violation, and disregard by plaintiffs of the express condition of the sale of tile to them by defendant Flintkote and has in no way resulted and does not and will not in any way result from any wrongful or unlawful acts or courses of conduct of defendant Flintkote.

Wherefore, defendant The Flintkote Company prays that plaintiffs take nothing by their claim or claims and that defendant Flintkote have judgment against plaintiffs for its costs in the defense of this action.

McCUTCHEN, BLACK, HARNAGEL & GREENE,
GEORGE HARNAGEL, JR.,
G. RICHARD DOTY,

By /s/ G. RICHARD DOTY.

Affidavit of Service by Mail attached.

[Endorsed]: Filed June 26, 1953.

[Title of District Court and Cause.]

DEFENDANT'S PROPOSED JURY INSTRUCTIONS

Defendant, The Flintkote Company, requests that the Court give to the jury the instructions annexed hereto numbered 1 through 53.

Dated: May 3rd, 1955.

McCUTCHEN, BLACK, HARNAGEL & GREENE,

HAROLD A. BLACK,

G. RICHARD DOTY,

By /s/ G. RICHARD DOTY,
Attorneys for Defendant,
The Flintkote Company.

Defendant's Instruction No. 1

Ladies and Gentlemen of the Jury:

It becomes my duty as judge to instruct you in the law that applies to this case, and it is your duty as jurors to follow the law as I shall state it to you. On the other hand, it is your exclusive province to determine the facts in the case, and to consider and weigh the evidence for that purpose. The authority thus vested in you is not an arbitrary power, but must be exercised with sincere judgment, sound discretion, and in accordance with the rules of law stated to you.

Exact copy of form 1 BAJI.

Defendant's Requested Instruction No. 1:
Given: .....
Refused: .....
Given as Modified: .....

....., Judge of the United States District Court.

Defendant's Instruction No. 2

If in these instructions, any rule, direction or idea be stated in varying ways, no emphasis thereon is intended by me, and none must be inferred by you. For that reason, you are not to single out any certain sentence, or any individual point or instruction, and ignore the others, but you are to consider all the instructions and as a whole, and to regard each in the light of all the others.

Exact copy of form 2 BAJI.

Defendant's Requested Instruction No. 2:
Given: .....
Refused: .....
Given as Modified: .....

....., Judge of the United States District Court.

Defendant's Instruction No. 3

Statements of law often cannot be made abstractly, but must be related to possible situations of fact. Throughout my instructions you will bear in mind that whenever the possibility of a certain state of facts is assumed for the purpose of stating the applicable law, I do not mean to imply an opinion that the evidence has proved the existence of those facts, nor to suggest an opinion favorable or unfavorable to any party.

Exact copy of form 35, BAJI 1950 Supplement, except adaptations.

Defendant's Requested Instruction No. 3.
Given: .....
Refused: .....
Given as Modified: .....

....,
Judge of the United States
District Court.

Defendant's Instruction No. 4

At times throughout the trial the court has been called upon to pass on the question whether or not certain offered evidence might properly be admitted. You are not to be concerned with the reasons for such rulings and are not to draw any inferences from them. Whether offered evidence is admissible is purely a question of law. In admitting evidence to which an objection is made, the court does not

determine what weight should be given such evidence; nor does it pass on the credibility of the witness. As to any offer of evidence that has been rejected by the court, you, of course, must not consider the same; as to any question to which an objection was sustained, you must not conjecture as to what the answer might have been or as to the reason for the objection.

Exact copy of form 3 BAJI.

Defendant's Requested Instruction No. 4.
Given: .....
Refused: .....
Given as Modified: .....

....,
Judge of the United States
District Court.

Defendant's Instruction No. 5

You must weigh and consider this case without regard to sympathy, prejudice or passion for or against any party to the action.

Exact copy of form 4 BAJI except adaptations.

Defendant's Requested Instruction No. 5.
Given: .....
Refused: .....
Given as Modified: .....

....,
Judge of the United States
District Court.

Defendant's Instruction No. 6

If during this trial I have said or done anything which has suggested to you that I am inclined to favor the claims or position of either party, you will not suffer yourself to be influenced by any such suggestion.

I have not expressed, nor intended to express, nor have I intended to intimate, any opinion as to which witnesses are, or are not, worthy of belief; or what inferences should be drawn from the evidence. If any expression of mine has seemed to indicate an opinion relating to any of these matters, I instruct you to disregard it.

Exact copy of form 5 BAJI, except adaptations.

Defendant's Requested Instruction No. 6.
Given: .....
Refused: .....
Given as Modified: .....

....., Judge of the United States District Court.

Defendant's Instruction No. 7

You shall not consider as evidence any statement of counsel made during the trial, unless such statement was made as an admission or stipulation conceding the existence of a fact or facts.

You must not consider for any purpose any offer of evidence that was rejected, or any evidence that

was stricken out by the court; such matter is to be treated as though you never had known of it.

You are to decide this case solely upon the evidence that has been received by the court, and the inferences that you may reasonably draw therefrom, and such presumptions as the law deduces therefrom, as noted in my instructions, and in accordance with the law as I state it to you.

Exact copy of form 23 BAJI.

Defendant's Requested Instruction No. 7.
Given: .....
Refused: .....
Given as Modified: .....

.....,
Judge of the United States
District Court.

Defendant's Instruction No. 8

A witness is presumed to speak the truth. This presumption, however, may be overcome by contradictory evidence; by the manner of the witness on the stand, the degree of intelligence exhibited by him, and the manner in which he testifies; by the character of his testimony; by evidence showing his motives, an interest in the outcome of the case, or bias or prejudice against one of the parties; by evidence that on some former occasion he made a statement or statements inconsistent with his present testimony.

Exact copy of form 26 BAJI, 1950 Supplement, with adaptations.

Defendant's Requested Instruction No. 8.
Given: .....
Refused: .....
Given as Modified: .....

....., Judge of the United States District Court.

Defendant's Instruction No. 9

A witness false in one part of his testimony is to be distrusted in others; that is to say, you may reject the whole testimony of a witness who wilfully has testified falsely as to a material point, unless, from all the evidence, you shall believe that the probability of truth favors his testimony in other particulars.

Exact copy of form 27 BAJI.

Defendant's Requested Instruction No. 9.
Given: .....
Refused: .....
Given as Modified: .....

....., Judge of the United States District Court.

Defendant's Instruction No. 10

This is an action under Section 7 of the Sherman Act, as amended by Section 4 of the Clayton Act, incorporated in Title 15 of the United States Code Annotated Section 15.

It is a private, as distinguished from a governmental, action. And it is brought by Elmer Lysfjord and Walter R. Waldron doing business as aabeta co. against The Flintkote Company, a Corporation.

> Cape Cod Food Products vs., National Cranberry Ass'n. (D. C., Mass. 1954) 119 F. Supp. 900, 904.

Defendant's Requested Instruction No. 10.
Given: .....
Refused: .....
Given as Modified: .....

.....,
Judge of the United States
District Court.

Defendant's Instruction No. 11

The provision in the law which permits a person to bring an action of this type is 15 U.S.C.A., Section 15. It states in pertinent part:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor * * * and shall recover threefold the damages by him sustained * * *"

15 U.S.C.A. Sec. 15.

Defendant's Requested Instruction No. 11.
Given: .....
Refused: .....
Given as Modified: .....

.....,
Judge of the United States
District Court.

Defendant's Instruction No. 12

The plaintiffs claim that they have sustained injuries as a result of an alleged violation by The Flintkote Company and other persons of Section 1 or Section 2 of the Sherman Act. Section 1, insofar as is pertinent, provides:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States or with foreign nations, is hereby declared to be illegal * * *"

Section 2, insofar as it is pertinent, provides:

> "Every person who shall * * * combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor * * *"

15 U.S.C.A., Sec. 1.

See paragraphs 1 and 2, pages 1 and 2 of First Amended Complaint.

Defendant's Requested Instruction No. 12.

Given: .....

Refused: .....

Given as Modified: .....

.....,
Judge of the United States
District Court.

Defendant's Instruction No. 13

In order for plaintiffs to recover in this action they must prove all of the elements of a cause of action entitling them to such recovery.

Defendant's Requested Instruction No. 13.

Given: .....

Refused: .....

Given as Modified: .....

.....,
Judge of the United States
District Court.

Defendant's Instruction No. 14 (New)

In this case plaintiffs have the affirmative of all issues and they must carry the burden of proving

all the issues. This "burden of proof" means that if no evidence were given on either side of an issue, your finding as to it would have to be against the plaintiffs. When the evidence is contradictory, the decision must be made according to the preponderance of evidence, by which is meant such evidence as, when weighed with that opposed to it, has more convincing force, and from which it results that the greater probability of truth lies therein. Should the conflicting evidence be evenly balanced in your minds so that you are unable to say that the evidence on either side of the issue preponderates, then your finding must be against the plaintiffs.

See form 21 BAJI.

Defendant's Requested Instruction No. 14 (New).
Given: .....
Refused: .....
Given as Modified: .....

....,
Judge of the United States
District Court.

Defendant's Instruction No. 15

Although I cannot formally control you when you get into the jury room, I strongly recommend that you approach this case in the order in which my charge to you approaches it.

Cape Cod Food Products vs. National Cranberry Ass'n. (D. C. Mass., 1954) 119 F. Supp. 900.

Defendant's Requested Instruction No. 15.
Given: .....
Refused: .....
Given as Modified: .....

....,
Judge of the United States
District Court.

Defendant's Instruction No. 16

A primary question for you to consider is whether defendant The Flintkote Company was a party to an unlawful contract, combination or conspiracy in restraint of interstate commerce, or to monopolize a part of such commerce. If you find that no such unlawful contract, combination or conspiracy existed or that The Flintkote Company was not a party to any such contract, combination or conspiracy which may have existed, you must return a verdict for the defendant and you need not consider any other questions.

15 U.S.C.A. Sec. 1.

15 U.S.C.A. Sec. 15

Cape Cod Food products vs. National Cranberry Ass'n. (D. C. Mass., 1954) 119 F. Supp. 900, 909-910.

Defendant's Requested Instruction No. 16.
Given: .....
Refused: .....
Given as Modified: .....

....,
Judge of the United States
District Court.

Defendant's Instruction No. 17

A "conspiracy" may be defined quite broadly as a combination of two or more persons by concerted action to do an unlawful thing or to do a lawful thing in an unlawful manner.

Marino vs. United States (C.C.A. 9th, 1937) 91 Fed. 2d 691, 693;

Lynch vs. Magnavox Co. (C.C.A. 9th, 1938) 94 Fed. 2d 883, 888-889;

Alaska S.S. Co. vs. International Longshoremen's Association (D.C., W.D. Wash. 1916) 236 Fed. 964, 969.

Defendant's Requested Instruction No. 17.
Given: .....
Refused: .....
Given as Modified: .....

....,
Judge of the United States
District Court.

Defendant's Instruction No. 18

More specifically, a conspiracy consists of the following elements: First, an object to be accomplished; second, a plan or scheme embodying means to accomplish that object; third, an agreement or an understanding between two or more persons whereby they become definitely committed to cooperate for the accomplishment of the object by the means embodied in the agreement, or by any effective means.

United States vs. Grossman (D.C., E.D. N.Y., 1931) 55 Fed. 2d 408, 410;

15 C.J.S., Conspiracy, sec. 35, p. 1058.

Defendant's Requested Instruction No. 18.
Given: .....
Refused: .....
Given as Modified: .....

....,
Judge of the United States
District Court.

Defendant's Instruction No. 19

The Flintkote Company can be liable for refusing to sell acoustical tile to plaintiffs only if such refusal to sell was in furtherance of and as a consequence of a knowing participation in an unlawful contract, combination or conspiracy.

Johnson vs. J. H. Yost Lumber Co. (C.C.A. 8th 1941) 117 F. 2d 53, 62;

Interborough News Co. vs. Curtis Publishing Co. (D.C., S.D.N.Y. 1954) 127 F. Supp. 286, 301.

Defendant's Requested Instruction No. 19.
Given: .....
Refused: .....
Given as Modified: .....

....., Judge of the United States District Court.

Defendant's Instruction No. 20

You may not use any admission made outside of court by members of the alleged conspiracy for purposes of determining whether The Flintkote Company was a member of an unlawful conspiracy unless The Flintkote Company, through its agents, was present when the statement was made, and the agent or agents so conducted himself or themselves as to signify agreement with the statements or declarations. If you conclude, however, from the evidence that The Flintkote Company was a member of an unlawful conspiracy, you may then consider as if made by said company any statements or declarations of other members of such conspiracy, provided such statements were made during the existence of the conspiracy and in furtherance of an object or purpose of the particular conspiracy.

United States vs. Schneiderman (D.C., S.D. Cal. 1952) 106 F. Supp. 892, 903;

United States vs. United States Gypsum Company 333 U.S. 364, 388-389, 68 S. Ct. 525, 538-539 (1948);

United States vs. Imperial Chemical Industries (D.C., S.D.N.Y. 1951) 100 F. Supp. 504, 512.

Defendant's Requested Instruction No. 20.
Given: .....
Refused: .....
Given as Modified: .....

.....,
Judge of the United States
District Court.

Defendant's Instruction No. 21

The defendant, The Flintkote Company, is a corporation, and as such acts only through its agents. A conspiracy, however, cannot exist between a corporation and its employees or agents acting in such capacity. You are instructed that there is nothing in the evidence which shows that any employee or agent of The Flintkote Company, insofar as this case is concerned, acted in any capacity other than as employee or agent. Accordingly, you may not base a finding of conspiracy merely upon any concert of action among the agents and employees of The Flintkote Company.

Nelson Radio & Supply Co. vs. Motorola, Inc. (C.A. 5th 1952) 200 F. 2d 911, cert. den. 345 U.S. 925, 73 S. Ct. 783 (1953);

Marion County Co-Op. Ass'n. vs. Carnation Co. (D.C., W.D. Ark. 1953) 114 F. Supp. 58.

Defendant's Requested Instruction No. 21.
Given: .....
Refused: .....
Given as Modified: .....

....,
Judge of the United States
District Court.

Defendant's Instruction No. 22

The Flintkote Company, or anyone else engaged in private enterprise may select its own customers, and in the absence of an illegal contract, combination or conspiracy, may sell or refuse to sell to any person, including these plaintiffs, for any cause or for no cause whatever.

United States vs. Colgate & Co. 250 U.S. 300, 39 S. Ct. 465 (1919);

Times-Picayune Pub. Co. vs. United States 345 U.S. 594, 73 S. Ct. 872, 889 (1953);

Johnson vs. J. H. Yost Lumber Co. 117 F. 2d 53, 61 (8th Cir. 1941);

Chicago Seating Co. vs. S. Karpen & Bros. 177 F. 2d 863 (7th Cir. 1949);

Nelson Radio & Supply Co. vs. Motorola, Inc. 200 F. 2d 911 (5th Cir. 1952), cert. denied, 345 U.S. 925, 73 S. Ct. 783 (1953);

Blue Bell Co. vs. Frontier Refining Co. 213 F. 2d 354 (10th Cir. 1954).

Defendant's Requested Instruction No. 22.
Given: .....
Refused: .....
Given as Modified: .....

....., Judge of the United States District Court.

Defendant's Instruction No. 23

You are instructed that you cannot find that The Flintkote Company was engaged in an unlawful contract, combination or conspiracy solely on the basis of the fact that The Flintkote Company refused to sell or stopped selling acoustical tile products to plaintiffs. You can so find only if there is other evidence of a substantial nature which furnishes a valid basis from which the alleged fact of such unlawful conduct may reasonably be inferred.

Johnson vs. J. H. Yost Lumber Co. (C.C.A. 8th 1941) 117 Fed. 2d 53.

Defendant's Requested Instruction No. 23.

Given: .....

Refused: .....

Given as Modified: .....

....,

Judge of the United States
District Court.

Defendant's Instruction No. 24

If you find that plaintiffs, contrary to a condition imposed by The Flintkote Company, invaded a trade territory of established dealers handling Flintkote products, you are instructed that that would be an ample reason of a substantial business character for The Flintkote Company to have refused to make further sales of acoustical tile to plaintiffs. If you find that The Flintkote Company refused to sell acoustical tile to plaintiffs for that reason and not as a consequence of a knowing participation in an unlawful conspiracy, then The Flintkote Company cannot be liable in any respect to plaintiffs for such refusal to sell.

Johnson v. J. H. Yost Lumber Co. (C.C.A. 8th 1941) 117 F.2d 53, 62

Interborough News Co. v. Curtis Publishing Co. (D.C., S.D.N.Y., 1954) 127 F. Supp. 286, 301

Defendant's Requested Instruction No. 24.
Given: .....
Refused: .....
Given as Modified: .....

....., Judge of the United States District Court.

Defendant's Instruction No. 25

Even if you find that The Flintkote Company declined to sell or discontinued selling acoustical tile to plaintiffs as the result of pressure brought upon The Flintkote Company by other persons, The Flintkote Company would not thereby participate in any unlawful conspiracy if it did not know that such conspiracy existed; and you cannot infer knowledge of such conspiracy solely from the fact, if it be the fact, that The Flintkote Company yielded to such pressure.

Johnson v. J. H. Yost Lumber Co. (C.C.A. 8th 1941) 117 F.2d 53, 62;

Interborough News Co. v. Curtis Publishing Co. (D.C., S.D.N.Y., 1954) 127 F.Supp. 286, 301.

Defendant's Requested Instruction No. 25.
Given: .....
Refused: .....
Given as Modified: .....

....., Judge of the United States District Court.

Defendant's Instruction No. 26

Before you can conclude that a combination agreement or concert constitutes an unlawful conspiracy or concert you must determine that its inherent tendency is substantially to lessen, hinder, or suppress competition in the channels of trade or commerce or to monopolize trade or commerce.

Fashion Originators' Guild v. Federal Trade Com'n 312 U.S. 457, 466, 61 S.Ct. 703, 707 (1941);

Shotkin v. General Electric Co. (C.A. 10th, 1948) 171 F.2d 236, 238.

Defendant's Requested Instruction No. 26.
Given: .....
Refused: .....
Given as Modified: .....

....., Judge of the United States District Court.

Defendant's Instruction No. 27

Merely because a contract, combination, agreement or concert results in a restraint of trade or commerce, it does not follow automatically that it is of an unlawful nature. Only unreasonable restraints of trade or commerce are condemned by the law.

Standard Oil Co. v. United States 221 U.S. 1, 31 S.Ct. 502, 517 (1911);

Board of Trade of City of Chicago v. United States 246 U.S. 231, 38 S.Ct. 242 (1918).

Defendant's Requested Instruction No. 27.
Given: .....
Refused: .....
Given as Modified: .....

.....,
Judge of the United States
District Court.

Defendant's Instruction No. 28

Whether or not a particular restraint is reasonable or unreasonable is a question of relation and degree.

Sugar Institute v. United States 297 U.S. 553, 600, 56 S.Ct. 629, 643 (1936).

Defendant's Requested Instruction No. 28.
Given: .....
Refused: .....
Given as Modified: .....

.....,
Judge of the United States
District Court.

Defendant's Instruction No. 29

The true test of the legality of a restraint of trade is whether the restraint imposed is such as merely

regulates and perhaps thereby promotes competition or whether it is such as suppresses or destroys competition. In arriving at your determination of this question you must consider the facts peculiar to the business to which the restraint is applied, the nature of the restraint, and its actual effect.

Board of Trade of City of Chicago v. United States 246 U.S. 231, 38 S.Ct. 242, 244 (1918).

Defendant's Requested Instruction No. 29.
Given: .....
Refused: .....
Given as Modified: .....

....., Judge of the United States District Court.

Defendant's Instruction No. 30

Before plaintiffs are entitled to recover damages for violations of the antitrust laws they must prove some appreciable harm to the general public in the form of undue or unreasonable restriction of trade and commerce as a result of a wrongful contract, combination, conspiracy, monopoly, or attempt to monopolize.

Shotkin v. General Electric Co. (C.A. 10th 1948) 171 F.2d 236.

Defendant's Requested Instruction No. 30.
Given: .....

Refused: .....
Given as Modified: .....

.....,
Judge of the United States
District Court.

Defendant's Instruction No. 31

The element of public injury may not be satisfied by anything less than proof of a substantial effect on the interstate commerce concerned.

Shotkin vs. General Electric Co. (C.A. 10th 1948) 171 Fed.2d 236, 239, 240;

Interborough News Co. v. Curtis Publishing Co. (D.C., S.D.N.Y., 1954) 127 F.Supp. 286, 301.

Defendant's Requested Instruction No. 31.
Given: .....
Refused: .....
Given as Modified: .....

.....,
Judge of the United States
District Court.

Defendant's Instruction No. 32

The general public interests have not been injured within the meaning of the law unless the restraint imposed brought about or was reasonably calculated to bring about an increase in prices to the consuming public, a diminution in the volume of merchandise in the competitive markets, a deterioration in

the quality of the merchandise available in the channels of commerce, or a similar consequence in the free flow of interstate commerce.

Shotkin v. General Electric Co. (C.A. 10th 1948) 171 F.2d 236, 238, 239;

Fedderson Motors, Inc. v. Ward (C.A. 10th 1950) 180 F.2d 519;

Interborough News Company v. Curtis Publishing Co. (D.C., S.D.N.Y., 1954) 127 F.Supp. 286, 301.

Defendant's Requested Instruction No. 32.
Given: .....
Refused: .....
Given as Modified: .....

....., Judge of the United States District Court.

Defendant's Instruction No. 33

There is nothing inherently unlawful in a manufacturer's establishing the policy of limiting the number of distributors in a given area. If you find that such a policy was established by The Flintkote Company for the purpose of promoting good relations with its own customers and furthering its own legitimate business interests and was not done for the purpose of bringing about an unlawful restraint of trade or the creation of a monopoly, there would be no violation of the antitrust laws in the estab-

lishment or maintenance of such a policy by The Flintkote Company.

Bascom Launder Corp. v. Telecoin Corp. (C.A.2d 1953) 204 F.2d 331, 335, Cert. den. 73 S.Ct. 1133;

Brosins v. Pepsi-Cola Co. (C.C.A.3d 1945) 155 F.2d 99, 102, 104;

Boro Hall Corporation v. General Motors Corporation (C.C.A.2d 1942) 124 F.2d 822, 823, and see opinion on denial of rehearing, 130 F.2d 196, 197;

United States v. Bausch & Lomb Optical (D.C., S.D.N.Y., 1942) 45 F.Supp. 387, 398-399, modified in non-pertinent respects, and, as modified, affirmed, 321 U.S. 707, 64 S.Ct. 805;

United States v. Addyston Pipe & Steel Co. (C.C.A.6th 1898) 85 F. 271, 287, affirmed, 175 U.S.211, 20 S.Ct. 96.

Defendant's Requested Instruction No. 33.
Given: .....
Refused: .....
Given as Modified: .....

....., Judge of the United States District Court.

Defendant's Instruction No. 34

If you find that certain persons connected with this case acted in a similar manner with knowledge

that other persons were so acting, you are permitted to consider such conscious parallel action as some evidence that such persons contracted, combined or conspired so to act.

But conscious parallel business behavior is not in itself a violation of the antitrust laws and does not necessarily show an agreement among the persons so acting.

Similarity of action may be the result not of previous agreement but of solving a similar situation in a similar manner.

The crucial question for determination in connection with conscious parallel behavior is whether it stemmed from independent decision or from agreement, tacit or expressed.

Theatre Enterprises v. Paramount Film D. Corp., 346 U.S. 537, 540-541, 74 S.Ct. 257, 259 (1954);

Fanchon & Marco v. Paramount Pictures (D.C., S.D.CAL, 1951) 100 F.Supp. 84, 90 and (C.A. 9th 1954) 215 F.2d 167, 170.

Defendant's Requested Instruction No. 34.
Given: .....
Refused: .....
Given as Modified: .....

....., Judge of the United States District Court.

Defendant's Instruction No. 35

A finding of monopoly in this case would necessarily involve a finding by you that certain persons had the power to control the acoustical tile business in Los Angeles and so exercised that power as to exclude others from the business. The essence of monopoly is the power to exclude competition generally in a field for the benefit of a particular person or class.

American Tobacco Co. v. United States, 328 U.S. 781, 66 S.Ct. 1125 (1946);

Interborough News Co. v. Curtis Publishing Co. (D.C., S.D.N.Y., 1954) 127 F.Supp. 286.

Defendant's Requested Instruction No. 35.
Given: .....
Refused: .....
Given as Modified: .....

....,
Judge of the United States
District Court.

Defendant's Instruction No. 36

A finding of attempt to monopolize in this case would necessarily involve a finding that certain persons employed methods, means and practices which would, if successful, accomplish monopolization and which, though falling short of monopoly, come so close as to create a dangerous probability thereof.

American Tobacco Co. v. United States, 328 U.S. 781, 66 S.Ct. 1125 (1946).

Defendant's Requested Instruction No. 36.
Given: .....
Refused: .....
Given as Modified: .....

....,
Judge of the United States
District Court.

Defendant's Instruction No. 37

The Flintkote Company has the exclusive right to control the distribution of its branded products, including acoustical tile. It does not, however, by itself have a monopoly of the acoustical tile business.

American Tobacco Co. v. United States, 328 U.S. 781, 66 S.Ct. 1125 (1946);

Arthur v. Kraft-Phoenix Cheese Corp. (D.C., M.D., 1938) 26 F.Supp. 824-828.

Defendant's Requested Instruction No. 37.
Given: .....
Refused: .....
Given as Modified: .....

....,
Judge of the United States
District Court.

Defendant's Instruction No. 38

You are instructed that as a matter of law neither The Flintkote Company nor any other person or corporation directly or indirectly connected with this case individually had a monopoly of the acoustical tile business in Los Angeles.

U. S. v. Aluminum Company of America (C.C.A.2d, 1945) 148 F.2d 416.

Defendant's Requested Instruction No. 38.
Given: .....
Refused: .....
Given as Modified: .....

....., Judge of the United States District Court.

Defendant's Instruction No. 39

You are further instructed as a matter of law that neither The Flintkote Company nor any other person or corporation directly or indirectly connected with this case attempted to monopolize for itself alone the acoustical tile business in Los Angeles.

American Tobacco Co. v. United States, 328 U.S. 781, 66 S.Ct. 1125 (1946);

U. S. v. Aluminum Company of America (C.C.A.2d 1945) 148 F.2d 416.

Defendant's Requested Instruction No. 39.
Given: .....
Refused: .....
Given as Modified: .....

....., Judge of the United States District Court.

Defendant's Instruction No. 40

It follows, then, that any finding of monopoly or attempt to monopolize in this case must be based upon a combination or conspiracy, to which The Flintkote Company was a party, the purpose of which was to monopolize the acoustical tile business in Los Angeles.

American Tobacco Co. v. United States, 328 U.S. 781, 66 S.Ct. 1125 (1946).

Defendant's Requested Instruction No. 40.
Given: .....
Refused: .....
Given as Modified: .....

....., Judge of the United States District Court.

Defendant's Instruction No. 41

I shall now instruct you on the subject of the measure of damages in this action because it is my

duty to instruct you as to all the law that may become pertinent in your deliberations. I, of course, do not know whether you will need the instructions on damages, and the fact that they are being given to you must not be considered as intimating any view of my own on the issue of liability or as to which party is entitled to your verdict.

Exact copy of form 180 BAJI, except underlined modifications.

Defendant's Requested Instruction No. 41.
Given: .....
Refused: .....
Given as Modified: .....

....,
Judge of the United States
District Court.

Defendant's Instruction No. 42

Even if plaintiffs convince you that The Flintkote Company has engaged in conduct prohibited by the antitrust laws and which has resulted in injury to the public, that, by itself, does not give plaintiffs the right to recover damages. Plaintiffs must go still farther, and the burden of proof is upon them to show some real and actual pecuniary loss or damage by reason of such unlawful conduct. There is no duty imposed by the law upon a defendant to show that its acts have not worked injury to a plaintiff. On the contrary, the duty and burden of proving injury to their business or prop-

erty is imposed by law upon the plaintiffs, and, unless they prove this fact of injury to their business or property as a result of such conduct by a preponderance of the evidence, they cannot recover damages.

Foster & Kleiser Co. v. Special Site Sign Co. (C.C.A. 9th 1936) 85 F.2d 742, 750;

Lowry v. Tile, Mantel & Grate Ass'n (C.C., N.D.Cal., 1900) 106 Fed. 38, 46, affirmed 115 Fed. 27;

Twin Ports Oil Co. v. Pure Oil Co. (C.C.A. 8th 1941) 119 F.2d 747, 751.

Defendant's Requested Instruction No. 42.
Given: .....
Refused: .....
Given as Modified: .....

....., Judge of the United States District Court.

Defendant's Instruction No. 43

A plaintiff in an antitrust action can recover damages only for injury to his business or property, which does not include damages for embarrassment, humiliation, disappointment, or other matters of a personal nature.

15 U.S.C.A. Sec. 15;

Keogh v. Chicago & N. W. Ry. Co., 260 U.S. 156, 165, 43 S.Ct. 47, 50 (1922);

Twin Ports Oil Co. v. Pure Oil Co. (C.C.A. 8th 1941) 119 F.2d 747, 751;

Leonard v. Socony-Vacuum Oil Co. (D.C., W.D.Wis. 1942) 42 F.Supp. 369;

see: Clark Oil Co. v. Phillips Petroleum Co. (C.C.A. 8th 1945) 148 F.2d 580, 582.

Defendant's Requested Instruction No. 43.
Given: .....
Refused: .....
Given as Modified: .....

....., Judge of the United States District Court.

Defendant's Instruction No. 44

In order for plaintiffs to recover damages they must show by a preponderance of the evidence that there is a direct causal relationship between the restraint and the specific claimed injuries. That is to say, the injuries must result from something forbidden or made unlawful by the antitrust laws and be the proximate result thereof.

Sullivan v. Associated B. & D. of United States (D.C., S.D.N.Y., 1919) 272 Fed. 323, 328;

Conference of Studio Unions v. Loew's, Inc. (C.A. 9th 1951) 193 Fed.2d 51.

Defendant's Requested Instruction No. 44.
Given: .....
Refused: .....
Given as Modified: .....

.....,
Judge of the United States
District Court.

Defendant's Instruction No. 45 (New)

The damages, if any, which you may award plaintiffs are not to be based on speculation or guesswork. Damages which you may award plaintiffs, are to be just and reasonable and must be based only on such relevant factual data, if any, as was placed in evidence in this case.

Bigelow v. R.K.O. Radio Pictures, 327 U.S. 251, 264, 66 Sup. Ct. 574, 579-580 (1946).

Defendant's Requested Instruction No. 45 (New).
Given: .....
Refused: .....
Given as Modified: .....

.....,
Judge of the United States
District Court.

Defendant's Instruction No. 46

The amount of damages alleged in the complaint is $100,000, but this allegation is merely a claim, is not evidence, and must not be considered by you as evidence in the event you should undertake to determine the amount of plaintiffs' damage.

Exact copy of form 173-A, BAJI, except adaptations.

Defendant's Requested Instruction No. 46.
Given: .....
Refused: .....
Given as Modified: .....

Withdrawn.

....., Judge of the United States District Court.

Defendant's Instruction No. 46(a) (New)

In the event you should determine that under the law as stated to you plaintiffs are entitled to damages in some amount, you will guide yourself in the computation of that sum by the following rules:

(a) Plaintiffs could not have sustained recoverable damages by reason of acts for which The Flintkote Company may be responsible prior to February 19, 1952, that being the date that The Flintkote Company advised plaintiffs that they would no longer sell acoustical tile to them except to cover plaintiffs' outstanding commitments.

Complaint, Par. II, 3;

International Tag & S. Co. v. American Salesbook Co. (D.C., S.D.N.Y., 1943) 6 FRD 45, 47.

Defendant's Requested Instruction No. 46(a) (New)
Given: .....
Refused: .....
Given as Modified: .....

....., Judge of the United States District Court.

Defendant's Instruction No. 46(b)(c)

(b) Plaintiffs would be entitled to recover for injuries sustained prior to July 21, 1952, that being the date this action was instituted.

(c) Plaintiffs would be entitled to recover for injuries sustained subsequent to July 21, 1952, only in the event that the preponderance of the evidence convinces you that such injuries occurred as a consequence of acts done before July 21, 1952. In other words, you are not to concern yourselves with acts, including refusals by The Flintkote Company to sell plaintiffs acoustical tile, which occurred after July 21, 1952; plaintiffs are not entitled to recover damages in this action for injuries, if any there were, resulting from such acts.

Lawlor v. Loewe, 235 U.S. 522, 35 Sup. Ct. 170, 172, (1915);

Connecticut Importing Co. v. Frankfort Distilleries (C.C.A. 2d, 1939) 101 Fed. 2d 79;

Frey & Son v. Cudahy Packing Co. (D.C., Md., 1917) 243 Fed. 205;

Savannah Theatre Co. v. Lucas & Jenkins (D.C., S.D.Ga., 1944) 8 F.R.Serv. 34.12, Case 2.

Defendant's Requested Instruction No. 46(b)(c).
Given: .....
Refused: .....
Given as Modified: .....

....., Judge of the United States District Court.

Defendant's Instruction No. 46(d) (New)

(d) Therefore, plaintiffs would be entitled to recover only for damages sustained, if any, as a consequence of acts for which The Flintkote Company is responsible and occurring between February 19, 1952, and July 21, 1952.

Complaint, Par. VIII, k;

Lawlor v. Loewe, 235 U.S. 522, Sup.Ct. 170, 172 (1915);

Connecticut Importing Co. v. Frankfort Distilleries (C.C.A.2d, 1939) 101 Fed.2d 79;

Frey & Son v. Cudahy Packing Co. (D.C. Md. 1917) 243 Fed. 205;

Savannah Theatre Co. v. Lucas & Jenkins (D.C., S.D.Ga., 1944) 8 F.R.Serv. 34.12, Case 2.

Defendant's Requested Instruction No. 46(d) (New)
Given: .....
Refused: .....
Given as Modified: .....

....., Judge of the United States District Court.

Defendant's Instruction No. 46(e)

(e) Plaintiffs' recovery in this action, if any, must be limited to damages resulting from the inability of plaintiffs to purchase acoustical tile from Flintkote on a direct basis during the period February 19, 1952, to July 21, 1952.

Connecticut Importing Co. v. Frankfort Distilleries (C.C.A.2d 1939) 101 Fed.2d 79;

Frey & Son v. Cudahy Packing Co. (D.C., Md. 1917) 243 Fed. 205.

Defendant's Requested Instruction No. 46(e).
Given: .....
Refused: .....
Given as Modified: .....

....., Judge of the United States District Court.

Defendant's Instruction No. 46(f)

(f) Plaintiffs cannot recover in this action any damages which may have resulted from their inability to obtain acoustical tile from the defendant Flintkote on a direct basis during any period commencing on or after July 21, 1952.

Connecticut Importing Co. v. Frankfort Distilleries (C.C.A.2d, 1939) 101 Fed.2d 79;

Frey & Son v. Cudahy Packing Co. (D.C., Md. 1917) 243 Fed. 205.

Defendant's Requested Instruction No. 46(f).
Given: .....
Refused: .....
Given as Modified: .....

....,
Judge of the United States
District Court.

Defendant's Instruction No. 47

You are instructed that if you should determine plaintiffs are entitled to damages, you are not to concern yourselves with the trebling of that sum. The trebling of the damages is no part of your function as a jury. That is a question for the Court.

Cape Cod Food Products v. National Cranberry Association (D.C., Mass., 1954) 119 Fed.Supp. 900, 910-911;

Lowry v. Tile, Mantel & Grate Ass'n of California (C.C., Cal., 1900) 106 Fed. 38, affirmed 115 Fed. 27.

Defendant's Requested Instruction No. 47.
Given: .....
Refused: .....
Given as Modified: .....

.....,
Judge of the United States
District Court.

Defendant's Instruction No. 48

Evidence has been admitted in this case showing that $20,000 was paid to plaintiffs by certain persons in exchange for an enforceable promise by plaintiffs not to sue those persons on account of the injuries claimed to have been sustained in this case. In paying the $20,000 those persons did not thereby admit legal liability. Neither the payment of the $20,000 nor the execution of the document entitled "Covenant Not to Sue" was in furtherance of any unlawful conspiracy.

The law favors compromises and settlements, and the settlement and payment of any claim made against the defendant and other persons by any person involved in the controversy in question must not be and cannot be construed to be an admission of liability, in favor of the plaintiffs in this case.

You will not, therefore, infer from the fact of payment that any contract, combination or conspiracy in restraint of trade or to monopolize trade existed or that plaintiffs sustained injuries as a consequence of acts in furtherance thereof.

See form 37 BAJI;

See: Zelayeta v. Pacific Greyhound Lines, 104 Cal.App.2d 716, 729, 232 Pac.2d 572 (1951);

Fiswick v. United States, 329 U.S. 211, 217, 67 S.Ct. 224, 227 (1946);

Logan v. United States, 144 U.S. 263, 309, 12 S.Ct. 617, 632 (1892);

Las Vegas Merchant Plumbers Ass'n v. United States (C.A. 9th 1954) 210 F.2d 732, 741;

United States v. Food & Grocery Bureau of Southern California (D.C., S.D.Cal., 1942) 43 F.Supp. 966, 969.

Defendant's Requested Instruction No 48.
Given: .....
Refused: .....
Given as Modified: .....

....., Judge of the United States District Court.

Defendant's Instruction No. 49

In the event you should determine under the principles of law stated to you that plaintiffs are entitled to damages in a certain amount by reason of acts for which The Flintkote Company is responsible, you will have to consider the question of whether plaintiffs have already been paid such damages either in part or in full.

Evidence has been presented to you which conclusively shows that plaintiffs already have received the sum of $20,000 from certain persons, either in full or partial compensation for injuries claimed to have been suffered in this case.

Therefore, in the event you determine that plaintiffs' total injuries sustained may be justly compensated by the sum of $20,000 or any lesser sum, you will award plaintiffs no damages whatsoever. If, however, you determine that plaintiffs' proved recoverable damages exceed the sum of $20,000, then you may award an amount equal to the total damages sustained less $20,000. In other words, you are instructed that any amount you might determine would justly compensate plaintiffs for their injuries is to be reduced by deducting the $20,000 already received and awarding plaintiffs the remainder.

15 U.S.C.A. Sec. 15;

Huskey Refining Co. v. Barnes (C.C.A. 9th 1941) 119 Fed.2d 715, 716;

Rector v. Warner Bros. Pictures (D.C., S.D. Cal. 1952) 102 F.Supp. 263, 264;

Harmon v. Gibens, 88 Ga.App. 629, 77 S.E.2d 223, 228 (1943);

McWhirter v. Otis Elevator Co. (D.C., W.D. S.C. 1941) 40 F.Supp. 11, 13;

Bedwell v. De Bolt (Ind.) 50 N.E.2d 875, 879 (1943);

Restatement of Torts, Section 885(3).

Defendant's Requested Instruction No. 49.
Given: .....
Refused: .....
Given as Modified: .....

....,
Judge of the United States
District Court.

Defendant's Instruction No. 50

The law forbids you to determine any issue in this case by resort to chance. You will understand this principle of law better, perhaps, if I give you an illustration: Suppose that after jurors have decided that a plaintiff is entitled to recover, they agree that each juror shall write down or state an amount of damages that he believes should be awarded, that all such amount shall be totaled, the total divided by twelve to find an average, and that the average so found shall be the amount of the verdict. To use such a method would be to deter-

mine the issue of damages by chance and would be unlawful.

Exact copy of form 181 Alternate, BAJI, 1950 Supplement.

Defendant's Requested Instruction No. 50.
Given: .....
Refused: .....
Given as Modified: .....

.....,
Judge of the United States
District Court.

Defendant's Instruction No. 51

It is your duty as jurors to consult with one another and to deliberate, with a view to reaching an agreement, if you can do so without violence to your individual judgment. You each must decide the case for yourself, but should do so only after a consideration of the case with your fellow jurors, and you should not hesitate to change an opinion when convinced that it is erroneous. However, you should not be influenced to vote in any way on any question submitted to you by the single fact that a majority of the jurors, or any of them, favor such a decision. In other words, you should not surrender your honest convictions concerning the effect or weight of evidence for the mere purpose of returning a verdict or solely because of the opinion of the other jurors.

Exact copy of form 7 BAJI.

Defendant's Requested Instruction No. 51.
Given: .....
Refused: .....
Given as Modified: .....

.....,
Judge of the United States
District Court.

Defendant's Instruction No. 52

The attitude and conduct of jurors at the outset of their deliberations are a matter of considerable importance. It is rarely productive of good for a juror, upon entering the jury room, to make an emphatic expression of his opinion on the case or to announce a determination to stand for a certain verdict. When one does that at the outset, his sense of pride may be aroused, and he may hesitate to recede from an announced position if shown that it is fallacious. Remember that you are not partisans or advocates in this matter, but are judges. The final test of the quality of your service will lie in the verdict which you return to the Court, not in the opinions any of you may hold as you retire. Have in mind that you will make a definite contribution to efficient judicial administration if you arrive at a just and proper verdict in this case. To that end, the Court would remind you that in your deliberations in the jury room there can be no triumph excepting the ascertainment and declaration of the truth.

Exact copy of form 8 BAJI.

Defendant's Requested Instruction No. 52.
Given: .....
Refused: .....
Given as Modified: .....

....,
Judge of the United States
District Court.

Defendant's Instruction No. 53

Upon retiring to the jury room you will select one of your number to act as foreman, who will preside over your deliberations and who will sign the verdict to which you agree. As soon as all twelve of you shall have agreed upon a verdict, you shall have it signed and dated by your foreman and then shall return with it to this room.

See Form 9 BAJI;

Maxwell v. Dow, 176 U.S. 586, 20 S.Ct. 448 (1900).

Defendant's Requested Instruction No. 53.
Given: .....
Refused: .....
Given as Modified: .....

....,
Judge of the United States
District Court.

[Endorsed]: Filed May 3, 1955.

[Title of District Court and Cause.]

MEMORANDUM OF POINTS AND AUTHORITIES ON EFFECT OF "COVENANT NOT TO SUE"

Defendant The Flintkote Company hereby submits a memorandum of points and authorities on the effect of the document entitled "Covenant Not to Sue," executed by plaintiffs and former defendants in the above-captioned action.

Respectfully submitted,

McCUTCHEN, BLACK, HARNAGEL & GREENE,

HAROLD A. BLACK,

G. RICHARD DOTY,

By /s/ G. RICHARD DOTY,
Attorneys for Defendant,
The Flintkote Company.

* * *

Covenant Not to Sue

This Agreement made and entered into between Elmer Lysfjord and Walter R. Waldron, co-partners doing business under the firm name and style of "aabeta co.", and the co-partnership of aabeta co., parties of the first part, hereinafter referred to as "covenantors," and L. D. Reeder Company of San Diego, R. E. Howard Company, The Harold E. Shugart Company, Inc., R. W. Downer Com-

pany, Coast Insulating Products, A. D. Hoppe, individually and doing business under the fictitious name and style of the Sound Control Company, The Paul H. Denton Co., Acoustics, Inc., L. E. Reeder, R. E. Howard, G. H. Morris, Roy Downer, Jr., Carroll Duncan, Charles L. Newport, Gustave Krause, Paul H. Denton, Acoustical Contractors Association of Southern California, Inc. (formerly known as Acoustical Contractors Association of Southern California, Inc.), parties of the second part, hereinafter referred to as "covenantees,"

Witnesseth

Whereas, on or about July 21, 1952, Elmer Lysfjord and Walter R. Waldron, doing business as aabeta co. filed a civil action in the United States District Court for the Southern District of California, Central Division, (No. 14350-T), against the covenantees herein and others, alleging purported violations of the antitrust statutes and laws of the United States by the defendants therein named in connection with the operation of covenantors' business in Los Angeles and San Bernardino, California, claiming damages in the sum of Two Hundred Twenty-five Thousand Dollars ($225,000.00); and

Whereas, the said plaintiffs in said action, covenantors herein, filed their first amended complaint on or about Feb. 24, 1953, against the covenantees herein and others alleging purported violations of said antitrust statutes and laws by the defendants therein named, claiming damages in said first

amended complaint of Three Hundred Thousand Dollars ($300,000.00); and

Whereas, all of the covenantees have filed answers denying the allegations of the original complaint and the first amended complaint; and

Whereas, the covenantors are desirous, both jointly and severally, and as a co-partnership or other entity or association under the name of aabeta co., of discontinuing their action against the covenantees herein, and each of them, and the covenantees herein are desirous of having said action discontinued against each of them; and it is the joint and several desire of the covenantors and covenantees that the covenantees herein be assured that covenantors' action filed by them will be discontinued against the covenantees and each of them, and that no other action will be instituted by the covenantors against the covenantees, either jointly or severally, under any of the antitrust statutes or laws of the United States or of the State of California, or under the statutes or laws of any sovereignty whatsoever, on any of the matters set forth in the original or first amended complaint or on matters accruing to and including the day of execution of this covenant; and

Whereas, the covenantors do hereby represent that no other person or persons are partners in aabeta co., and that no other person or persons has or have any interest in the ownership, management, operation or control thereof, and that no other per-

son or persons has or have any interest in the action No. 14350-T other than the covenantors;

Now, Therefore, for and in consideration of the sum of Twenty Thousand Dollars ($20,000.00), receipt of which is hereby acknowledged by them, the undersigned covenantors do hereby covenant and agree with the undersigned covenantees and each of them as follows:

I.

That the undersigned covenantors have the sole and exclusive right to enter into this covenant not to sue for themselves, jointly and severally, and in behalf of aabeta co., a co-partnership or other association or entity, and that no other person or persons has or have any interest in the ownership, management, operation or control of aabeta co., and that no other person or persons has or have any interest in the action being discontinued against the covenantees herein.

II.

That the undersigned covenantors will not jointly or severally sue the covenantees L. D. Reeder Company of San Diego, R. E. Howard Company, The Harold E. Shugart Company, Inc., R. W. Downer Company, Coast Insulating Products, A. D. Hoppe, individually and doing business under the fictitious name and style of the Sound Control Company, The Paul H. Denton Co., Acoustics, Inc., L. E. Reeder, R. E. Howard, G. H. Morris, Roy Downer, Jr., Carroll Duncan, Charles L. Newport, Gustave Krause, Paul H. Denton, Acoustical Contractors

Association of Southern California, Inc. (formerly known as Acoustical Contractors Association of Southern California, Inc.), or any of them, or any of their officers, directors, shareholders, partners, successors, assigns, agents, servants or employees, on account of any claim, demand, action, or cause of action, of any kind or nature, arising out of, or in any manner connected with, or relating to the matters alleged in the original, or first amended complaints; or arising out of, or in any manner connected with, or relating to the ownership, management, operation or control of the business of the covenantors, either jointly or severally, or under the name of aabeta co., or any other name, either as a co-partnership, association or any other entity, which may be directly or indirectly connected with, or related to any of the antitrust statutes or laws of the United States or of the State of California or of any other statute or law of any sovereignty whatever, to and including the date of execution of this covenant not to sue.

III.

That the undersigned covenantors shall upon execution of this covenant not to sue, dismiss without prejudice, their action No. 14350-T heretofore filed by them, against all of the covenantees herein, without costs, and shall not reinstitute or attempt to continue said action.

IV.

That the sum of Twenty Thousand Dollars ($20,000.00) paid herein to the covenantors as considera-

tion for the execution of this covenant not to sue does not represent to covenantors and shall not be construed as full compensation for the alleged damages claimed to have been suffered by the covenantors in their original complaint and in their first amended complaint, but is only partial compensation therefore, and it is understood and agreed that the covenantors do not in any manner or respect waive or relinquish any claim or claims against any other persons, firms, or corporations than those expressly named and designated herein, and that specifically covenantors retain their claims and causes of action against all other parties who are defendants in original and first amended complaints, including The Flintkote Company.

V.

That should the covenantors or either or any of them breach any of the covenants or agreements herein set forth, then they promise and agree, jointly and severally, to indemnify and hold harmless the covenantees, singly and collectively, and any shareholder, partner, successor, assign, servant, agent and employee of any covenantee, from any damage resulting from any such breach by the covenantors, or either or any of them, including but not limited to, the costs and expenses of defending any action or proceeding instituted by covenantors, or either or any of them, costs and expenses of defending the continuation of civil action No. 14350-T by covenantors, or any or either of them, the costs and expenses of any action instituted by any of the cov-

enantees for breach of this covenant not to sue by the covenantors, or either or any of them. Such costs and expenses shall include, but not be limited to, preparation of the defense of any action instituted by covenantors or either or any of them against covenantees, or any of them, preparation of the defense of the present action should it be continued by the covenantors, the prosecution of any action instituted by covenantees for breach of this covenant by covenantors, and shall include reasonable attorneys' fees and all other costs and expenses, whether taxable or not.

VI.

That nothing herein set forth is intended to mean nor to be construed as any admission of liability on the part of any of the covenantees with respect to any of the matters alleged in the complaint and the first amended complaint.

VII.

That each and all of the terms, covenants and conditions of this covenant not to sue shall inure to the benefit of, and shall be binding upon their respective heirs, successors (whether by merger or otherwise), assigns, executors, administrators and transferees of each of the parties hereto, their officers, directors, shareholders, partners, agents, servants and employees.

VIII.

This agreement is executed in quadruplicate, of which each is an original.

In Witness Whereof the covenantors and the covenantees have affixed their names the day and year first above written, the name of each corporate covenantee being affixed by its officers thereunto duly authorized.

/s/ ELMER LYSFJORD,

/s/ WALTER R. WALDRON,

aabeta co.,

By /s/ ELMER LYSFJORD,

Covenantors.

L. D. REEDER COMPANY OF SAN DIEGO,

By /s/ L. D. REEDER;

R. E. HOWARD COMPANY,

By /s/ R. E. HOWARD;

THE HAROLD E. SHUGART COMPANY, INC.,

By /s/ G. H. MORRIS;

R. W. DOWNER COMPANY,

By /s/ ROBERT ARNETT;

COAST INSULATING PRODUCTS,

By /s/ G. J. KRAUSE;

A. D. HOPPE, Individually and Doing Business Under the Fictitious Name and Style of THE SOUND CONTROL COMPANY,

By /s/ A. D. HOPPE;

THE PAUL H. DENTON CO.,

By /s/ PAUL H. DENTON;

ACOUSTICS, INC.,

By /s/ J. CARROLL DUNCAN;

/s/ L. D. REEDER,

/s/ R. E. HOWARD,

/s/ G. H. MORRIS,

/s/ ROY DOWNER, JR.,

/s/ J. CARROLL DUNCAN,

/s/ C. L. NEWPORT,

/s/ G. J. KRAUSE,

/s/ PAUL H. DENTON.

ACOUSTICAL CONTRACTORS ASSOCIATION OF SOUTHERN CALIFORNIA, INC. (Formerly Known as ACCOUSTICAL CONTRACTORS ASSOCIATION OF SOUTHERN CALIFORNIA, INC.),

By /s/ G. H. MORRIS,

By /s/ PAUL H. DENTON, Sec.,

Covenantees.

Dated this 31st day of July, 1953, LK, ACA.

[Endorsed]: Filed May 6, 1954.

[Title of District Court and Cause.]

VERDICT

We, the Jury in the above-entitled cause, find in favor of the plaintiffs, Elmer Lysfjord and Walter R. Waldron, and against the defendant, The Flintkote Company, and fix the plaintiff' damages in the amount of ($50,000.00) Fifty Thousand and no/100.

Dated at Los Angeles, California, this 26th day of May, 1955.

/s/ DOYLE J. McDANIEL,
Foreman of the Jury.

[Endorsed]: Filed May 26, 1955.

[Title of District Court and Cause.]

MOTION FOR JUDGMENT N.O.V. AND FOR NEW TRIAL

Defendant The Flintkote Company moves the Court as follows:

1. To set aside the verdict of the jury in the above-entitled action and to enter judgment therein in favor of defendant and against plaintiffs in accordance with defendant's motion for a directed verdict at the close of all of the evidence upon the ground that plaintiffs have not introduced any substantial evidence tending to show that The Flintkote Company has done any act or acts in violation of the Antitrust Laws.

2. To grant a new trial in the above-entitled action on all of the issues therein upon the following grounds:

(a) Substantial and prejudicial errors of law were committed in the course of the trial.

(b) The verdict of the jury is not supported by legally sufficient evidence.

(c) The verdict of the jury is against the weight of the evidence.

(d) The damages assessed by the jury are excessive.

McCUTCHEN, BLACK, HARNAGEL & GREENE,

HAROLD A. BLACK,

G. RICHARD DOTY,

By /s/ G. RICHARD DOTY,
Attorneys for Defendant,
The Flintkote Company.

[Endorsed]: Filed June 1, 1955.

[Title of District Court and Cause.]

PETITION FOR ATTORNEY'S FEES AND COSTS

The petition of Alfred C. Ackerson respectfully shows and alleges:

That this petition is based upon Exhibit A attached hereto; upon the Points and Authorities at-

tached hereto, and upon the following representations of your petitioner:

That your petitioner is a duly qualified member of this Court, of the highest Court of California, of the United States District and Appellate Courts of the District of Columbia, and of the Supreme Court of the United States; that he has been engaged in the practice of prosecuting and defending antitrust cases and related cases since in or about the year 1934; that in the instant proceeding he has performed the services indicated in Exhibit A attached hereto and mentioned hereinabove in addition to other time not noted in said exhibit. That the attorney's fees to be awarded by the Court in this case are strictly of a contingent nature dependent entirely upon the succeess of the litigation and petitioner's efforts, and not payable otherwise; that your petitioner has spent a total minimum hours of office time in the preparation and trial of this case of 515½ hours and has spent a total of 21 days in Court in addition to a number of brief pre and post-trial conferences; that your petitioner is of the opinion that such services are of a specialized nature and under normal circumstances would be of the reasonable value of $40 per hour for work performed in the office and outside of the courtroom, and at a minimum rate of $250 per day for each four-hour Court day or portion thereof.

Your petitioner further alleges that the attorney's fee in the instant case is contingent upon the successful efforts of your petitioner and would not be

payable otherwise; that for this reason and in accordance with general principles of evaluating attorney's fees, the fee should be enhanced by between 50% and 100% over a guaranteed fee not based upon such a contingency.

Your petitioner further alleges with respect to the costs incurred and expended by plaintiffs in the instant proceeding that the original depositions of plaintiffs, Lysfjord and Waldron, consuming approximately three full days, while taken by certain of the contractor defendants and the Association defendant, were in fact purchased by counsel for the defendant Flintkote and were utilized by said defendant during the trial of the case. The cost to plaintiffs of copies of these depositions was in the sum of $118.30 and is included in the Cost Bill form under the title of "Costs Incident to Taking of Depositions." It is, therefore, your petitioner's position that both the cost of these depositions and the time consumed in taking them are proper items to be considered in the awarding of costs and affixing of attorney's fees.

In the tabulation of office and Court time consumed by petitioner in the preparation and trial of this case the Court's attention is directed to the fact that at least a part of the two conferences which plaintiffs' counsel had with Mr. Norman Sterry was in fact taken up in a discussion of the possibilities of settlement of the case. Likewise, the item of July 21, 1953, consisting of two hours, was

the actual conference which resulted in the payment of $20,000 to plaintiffs and the execution of the Covenant Not to Sue. Other time spent in this latter connection was not recorded and is not included in the tabulation of time.

The Court will, of course, take notice of the fact that the Court days enumerated in Exhibit A were for the most part not full four-hour Court sessions, but were for the most part three or three and one-half hour sessions. Your petitioner alleges that it has been his practice in the past, and he believes such practices to be fair to charge in matters of this kind a fee for one-half Court day for any appearance of whatever duration, and to charge for a full Court day for any appearance requiring over two hours' Court time.

Wherefore, your petitioner prays that this Court award as attorney's fees in the instant proceeding a minimum sum of $40,000, together with costs of Court as shown by the Cost Bill.

/s/ ALFRED C. ACKERSON,
Petitioner.

EXHIBIT A

Schedule of Time

Date (1952)	Remarks	Hours
4/29	Conference with plaintiffs regarding facts of case	1
6/17	Drafting Original Complaint	6

Date	Remarks	Hours
6/19	Factual study and drafting Complaint	7
6/20	Same	6
6/21	Revising Complaint	3
6/23	Factual preparation	6
7/28	Complaint revision, execution, and filing	3
8/25	Conference with plaintiffs	1
9/19	Defendants' depositions	6
9/22	Same	6
10/ 7	Deposition of Waldron	6
10/ 8	Preparation of Demands for Production of Documents	3
10/13	Depositions of plaintiffs	6
10/27	Conference, Judge's Chambers, with opposing counsel	1
11/ 3	Document search and analysis	1
11/ 5	Examination of Howard Company documents at Howard's offices	3
12/19	Argument on defendants' Motions for More Specific Statement, etc.	½ court day
(1953)		
1/ 5	Drafting Amended Complaint	7
1/ 6	Same	7
1/ 7	Same	7
1/ 8	Revising Amended Complaint	3
1/ 9	Further revisions of Amended Complaint	2½
1/16	Conference with plaintiffs	2
1/19	Miscellaneous office time	3
1/23	Factual preparation	2
1/28	Preparation in opposition to defendants' various motions	3
2/ 4	Office time	2
2/ 9	Argument re defendants' motions	½ court day
2/24	Argument re plaintiffs' further motions to Amended Complaint	½ court day
2/27	Conference with Norman Sterry, counsel for Shugart	2
3/ 6	Conference with Norman Sterry, counsel for Shugart	2
3/23	Court appearance re motions	½ court day
4/21	Preparation of opposition to defendants' Motions for More Definite Statement, etc.	1

Date	Remarks	Hours
4/22	Conferences and preparation of opposition to defendants' motions	4
4/27	Preparation of opposition to defendants' motions	2
4/28	Further preparation of opposition to defendants' motions	6
4/29	Same	5
5/ 1	Factual preparation and investigation	7
5/11	Argument of defendants' Motions to Amended Complaint	½ court day
5/21	Office work	2
5/25	Office work	2
6/12	Conference with defendant attorney Kaminar	3
6/15	Conference with plaintiffs	1
6/16	Conferences re filing of Answers	1
6/29	Conferences with plaintiffs and defense counsel	4
6/30	General office preparation	7
7/ 6	Preparation of Interrogatories	3
7/13	Preparation of plaintiffs' Interrogatories	7
7/29	Drafting covenant not to sue	2
7/31	Conferences with defense attorneys, etc., re settlement	2
8/12	Additional Interrogatories, Flintkote	2½
8/13	Flintkote and aabeta Demand for Production of Documents	3
11/ 7	Preparation of Answers to Flintkote Interrogatories	7
11/ 9	Same	7
11/10	Same	7
11/11	Case preparation	7
11/12	Same	7
11/13	Same	7
11/14	Same	3
11/16	Preparation of Interrogatories or Answers thereto	7
11/17	Same	7
11/19	Same	3
11/23	Further preparation of Interrogatories	1½

Date	Remarks	Hours
(1954)		
1/25	Inspection of aabeta records at aabeta company by Doty, etc.	3
2/12	Conference with Doty (no time noted)	
4/ 5	Defendants' Motion and trial setting	½ court day
9/30	Office conference with plaintiffs	1
10/19	Office conference with plaintiffs	1
10/22	Office conference, plaintiffs	2
(1955)		
4/26	Defendant's taking of plaintiffs' depositions	½ day
	Defendant's deposition, William Yeomans	2
3/ 4	Conference with plaintiffs re trial preparation	2
3/ 8	Trial preparation	7
3/10	Same	6
3/11	Same	3
3/17	Same	3
3/22	Same	7
3/23	Same	7
3/24	Same	7
3/25	Same	7
3/28	Same	7
3/29	Same	7
3/30	Same	7
3/31	Same	7
4/ 1	Trial preparation	3
4/15	Same	3
4/18	Same	7
4/23	Same	7
4/25	Trial preparation	7
4/26	Trial preparation	12
	(Note: 3 hours of this possibly duplication of time noted on p. 3 for same date.)	
4/28	Trial preparation	7
4/29	Same	7
4/30	Same	7
5/ 2	Preparation for trial and jury instructions	7
5/ 3	Same	7

Date	Remarks	Hours
5/ 4	Trial of case	1 court day
5/ 4	Trial preparation	3
5/ 5	Trial of case	1 court day
5/ 5	Trial preparation	4
5/ 6	Trial day	1 court day
5/ 6	Trial preparation	5
5/ 7	Trial preparation and briefs	7
5/ 8	Preparation of briefs and examination and organization of damage evidence	7
5/ 9	Trial day	1 court day
5/ 9	Trial preparation	4
5/10	Trial day	1 court day
5/10	Trial preparation	4
5/11	Trial day	1 court day
5/11	Trial preparation	4
5/12	Trial day	1 court day
5/12	Trial preparation	4
5/13	Trial day	1 court day
5/13	Trial preparation	4
5/14	Preparation of brief and examination of defendants' cases re motions	7
5/16	Trial day	1 court day
5/16	Trial preparation	4
5/17	Trial day	1 court day
5/17	Trial preparation	4
5/18	Trial day	1 court day
5/18	Trial preparation	4
5/19	Trial day	1 court day
5/19	Trial preparation	4
5/20	Trial day	1 court day
5/20	Same	4
5/21	Trial preparation	6
5/23	Trial day	1 court day
5/23	Trial preparation	4
5/24	Trial day	1 court day
5/24	Trial preparation	4
5/25	Trial day	1 court day
5/25	Trial preparation	4
5/26	Trial day	1 court day
5/26	Trial preparation	2

Date	Remarks	Hours
5/27	Preparation of draft of Petition for Attorney's fees, etc.	6
5/31	Petition for attorney's fees and Bill of Costs, and research re Covenant Not to Sue	6
6/ 2	Judgment forms	3
6/ 6	Judgment forms, legal memos, and miscellaneous research	6
6/ 7	Further research re application of $20,000	6

Totaling: 515½ hours' office preparation and 20½ court days.

Duly verified.

Affidavit of Service by Mail attached.

[Endorsed]: Filed June 15, 1955.

[Title of District Court and Cause.]

STIPULATION

It Is Hereby Stipulated that the parties originally named as defendants herein, other than The Flintkote Company, paid to plaintiffs the sum of $20,000 upon delivery to said defendants of a covenant not to sue, dated July 31, 1953, copy of which was attached to defendant's Memorandum of Points and Authorities on Effect of "Covenant Not to Sue" filed herein on May 4, 1955.

Prior to the trial of the above-action, plaintiff and defendant The Flintkote Company agreed that said defendant would not offer before the jury evidence of said payment or of the execution of said document, and would withdraw its request for defendant's proposed Instruction No. 49.

This was done on the understanding that without prejudice to the rights and objections of either party and without prejudice to the right of either party to appeal from or seek reconsideration of an adverse ruling, the Court shall determine, with the same effect, all issues that would have been presented if evidence of said payment, and said document, had been offered by defendant before the jury, and if said Instruction No. 49 had been proposed by defendant.

It is expressly understood that any and all objections, jurisdictional or otherwise, to said offers in evidence or to proposed Instruction No. 49, and any and all arguments relating to the effect of said payment, are preserved unimpaired to plaintiffs, despite this stipulation, except the objection and argument that defendant waived any rights it otherwise would have had by not attempting to offer before the jury evidence of said payment or said document, or by withdrawing its request for said proposed Instruction No. 49.

Dated June 15, 1955.

McCUTCHEN, BLACK, HARNAGEL & GREENE,

HAROLD A. BLACK,

G. RICHARD DOTY,

By /s/ HAROLD A. BLACK,
Attorneys for Defendant,
The Flintkote Company.

ALFRED C. ACKERSON,

/s/ ALFRED C. ACKERSON,
Attorney for Plaintiffs.

It Is So Ordered:

/s/ LEON R. YANKWICH,
United States District Judge.

[Endorsed]: Filed June 20, 1955.

[Title of District Court and Cause.]

MINUTES OF THE COURT
JULY 8, 1955

Present: Hon. Ernest A. Tobin, District Judge.

Proceedings:

For hearing on defendant Flintkote's motion for judgment notwithstanding the verdict and for a new trial,

And for further proceedings re determination of treble damages, attorney's fees, and form of judgment to be entered.

Attorneys stipulate to submit petition, affidavit, and objections thereto re attorney's fees.

Attorney for defendant argues motion for judgment notwithstanding the verdict.

Attorney for plaintiff replies to defendant's argument.

Attorney for defendant argues motion for new trial.

It Is Ordered that defendant's motion for judgment notwithstanding the verdict and motion for new trial are denied, and that plaintiff's motion for attorneys' fees and costs and effect of payment of $20,000 on covenant not to sue will stand submitted.

JOHN A. CHILDRESS,
Clerk.

[Title of District Court and Cause.]

MEMORANDUM OF DECISION

This action was commenced against many defendants. It appears on the Court docket as Elmer Lysfjord, et al., versus L. D. Reeder Co. of San Diego, et al. As all defendants except The Flintkote Company have been dismissed from this action, the Court refers to the case as captioned herein, The Flintkote Company being the only defendant now before the Court. Plaintiffs sued to recover damages sustained by them because of defendants' violation of the antitrust laws. Before trial, all defendants (except The Flintkote Company) collectively paid plaintiffs $20,000.00 as consideration for a covenant not to sue upon the claim asserted in the complaint.

The Flintkote Company did not obtain such a covenant and at the beginning of the trial it stipulated that the facts relating to said covenant not to sue would be withheld from the attention of the jury. Plaintiffs and The Flintkote Company stipulated that without prejudice to the right of either

party to appeal or otherwise attack an adverse ruling, the Court would determine the effect upon the final judgment of the partial settlement of the case memorialized by the covenant not to sue.

The case was tried before a jury which rendered a general verdict for the plaintiffs. Damages were therein fixed at $50,000.00. The jury was not informed of the treble damage aspects of the controversy.

Section 4 of the Clayton Act requires the Court to treble the damages. The Court must determine whether the $20,000.00 received by plaintiffs as consideration for the covenant should be deducted from the damages as fixed by the verdict at $50,000.00 before such damages are trebled, or whether the Court shall order the damages trebled and deduct $20,000.00 from the $150,000.00 as the trebled damages.

The law reads as follows:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any District Court of the United States * * * and shall recover three-fold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee."[1]

The clear mandate of the statute directs that the collective liability of the tort obligors to the plaintiffs—that is, the total amount of the plaintiffs'

---

[1]Title 15, U.S.C.A., §15.

claim—be treble the amount of the plaintiffs' actual damages. Of this fact, the parties were well aware prior to the time of the covenant not to sue. Thus, if it be said that the covenantees in this instrument admitted no liability, and were merely buying their peace, it should be added that they not only were buying protection from costs and possible liability for damages suffered by the plaintiffs, but from treble the amount of those damages. The price paid represented not merely insulation from liability for the eventually determined damages of $50,000.00, but from the plaintiffs' claim of three times that sum. Plaintiffs expressly reserved their claims against all but these covenantees. Although the treble damage provision is punitive in function, and the trebled portion of the judgment cannot be regarded as representing recompense for actual damages suffered by the plaintiffs, niceties of semantics cannot obscure the intent of the covenantees to pay the $20,000.00 as consideration for relief from their total potential liability—that is, the damages plus the punitive addition.[2]

At early common law there could be but one judgment on a joint tort. Since the act of each tortfeasor acting in concert as in the instant case was the act of all, there was but one cause of action. This cause was "reduced to certainty" or merged

---

[2]Courts may construe the intention of the parties in covenants not to sue. [Westover, J., in the treble damage action, Rector v. Warner Bros. Pictures, (1952) 102 F. Supp. 263.]

in the judgment; and the judgment against one, even though unsatisfied, barred any later action against another. When a judgment was obtained against one wrongdoer in this class, the other was said to have been released. This was actually not a release but a relief from a lawsuit by operation of law.[3] The distinct principle that the plaintiff was entitled to but one compensation for his loss, was also developed in the same period. By application of this equitable principle, a satisfaction of the plaintiff's claim, even by a stranger to the action, prevented its further enforcement. The first rule has been generally repudiated in the United States. The second is confused by the concept of "joint tortfeasors," and further complicated by the use of releases.[4] By indirect application of those equitable principles recognizing a unity of interest among defendants, and allowing the plaintiff but one compensation for his loss, the rule arose in joint tort cases that though a judgment against one alone did not bar a judgment against the other, a satisfaction of the judgment by one party did in fact release the other from liability.[5] The use of the rule providing that the release of one releases all was so widened in scope, that by its dogmatic application, courts have deprived many plaintiffs of effective enforcement of meritorious claims where plaintiffs

[3]Prosser: 25 Cal. Law Rev. 413.

[4]Ibid, note 3.

[5]Restatement of contracts, §120, sub-sec. 3(b).; Restatement of judgments, (1942) §95.

have received only partial satisfaction from one obligor.[6]

The injustice of the application of the rule of release became apparent to many courts. They began to hold valid those instruments of release which contained express reservation of rights against other tort obligors. Other courts avoided the unity of cause theory and simply construed the agreements as covenants not to sue.[7] Lawyers then began to use the express language of covenant not to sue or prosecute.

By reasoning underlying this instrument, plaintiffs are entitled to a full redress of their injuries, or a satisfaction. They may receive a portion of this satisfaction and at the same time settle a portion of their rights with one defendant, reserving their rights against the other tort obligors. Their rights are limited, however, by the rule that they are entitled to only one satisfaction. Thus, the other tort obligors are liable solely for the balance of their damages. "No one can be allowed to recover more than one payment in full for the same claim by any device."[8]

Thus arises the problem of what constitutes satisfaction of the claim. The rule is said to be clear:

---

[6]Hawber v. Raley, 92 Cal. App. 701, 268 Pac. 943 (1928); 9 LRA 1066, 24 S. Calif. Law Rev. 466.

---

[7]Kincheloe v. Retail Credit Co., Inc., 4 Cal. (2d) 21, 46 Pac. (2d) 971 (1935); 148 ALR 1270 (1944); 24 S. Cal. Law Rev. 466.

---

[8]Williston on Contracts, § 388.

The payment of money must have been intended to be made on account of the injuries.[9] It is held by some authorities that unless proved otherwise, any amount of money received by a plaintiff as a result of such an agreement should be considered a payment toward satisfaction.[10]

Intention of the parties may properly be gleaned by courts from the language of the instrument.[11]

The pertinent provisions of the instrument in this case are:

"Whereas, the covenantors are desirous, both jointly and severally, * * * of discontinuing their action against the covenantees herein, and each of them, and the covenantees herein are desirous of having said action discontinued against each of them; and it is the joint and several desire of the covenantors and covenantees that the covenantees herein be assured that covenantors' action filed by them will be discontinued against the covenantees and each of them, and that no other action will be instituted by the covenantors against the covenantees, either jointly or severally, under any of the antitrust statutes or laws of the United States or of the State of California, or under the statutes or laws of any sovereignty whatsoever, on any of the matters set forth in the original or first amended

[9]Restatement of Torts, § 885.

[10]Restatement of Contracts, See § 120.

[11]Rector v. Warner Bros. Pictures (1952), 102 F. Supp. 263.

complain or on matters accruing to and including the day of execution of this covenant;

* * *

"That the sum of Twenty Thousand Dollars ($20,000.00) paid herein to the covenantors as consideration for the execution of this covenant not to sue does not represent to covenantors and shall not be construed as full compensation for the alleged damages claimed to have been suffered by the covenantors in their original complaint and in their first amended complaint, but is only partial compensation therefore, and it is understood and agreed that the covenantors do not in any manner or respect waive or relinquish any claim or claims against any other persons, firms, or corporations than those expressly named and designated herein, and that specifically covenantors retain their claims and causes of action against all other parties who are defendants in original and first amended complaints, including The Flintkote Company.

* * *

"That nothing herein set forth is intended to mean nor to be construed as any admission of liability on the part of any of the covenantees with respect to any of the matters alleged in the complaint and the first amended complaint.

"* * *."

Although the express mention of damages in the instrument might possibly be construed as a matter of form placed therein to preclude any implication of a release, the construction of the instru-

ment as a whole shows an intent of the parties that the consideration be applied as partial compensation to, or on account of, potential adjudicated damages.

As no evidence was offered, and no instruction given the jury informing them of the previous partial settlement, and the jury was limited to determination of the amount of actual damages, the verdict of $50,000.00 was determinative of the actual damages suffered by the plaintiffs. Treble damage actions are based on tort,[12] and ordinarily under tort rules a payment of this sum would constitute full satisfaction of the plaintiffs' claim. Thus, pursuant to the covenant not to sue, the partial compensation of $20,000.00 would be deducted immediately from the $50,000.00 verdict.[13] However, the treble damage provision is a remedy created by federal statute.[14] The remedies of the plaintiffs, and the liabilities of the tort obligor are determined under provisions of the Act. Section 4 of the Clayton Act (practically identical with Section 7 of the Sherman Act) provides that the plaintiff "* * * shall recover threefold the damage by him sustained * * *."[15] This provision allows actual dam-

[12]Rector v. Warner Bros. Pictures (1952), 102 F. Supp. 263; Ibid notes 2 and 12.

[13]McWhirter v. Otis Elevator Co. (1941), 40 F. Supp. 11.

[14]Title 15, U.S.C.A., § 15.

[15]Ibid.

ages to be determined under tort law by the trier of fact, but to this sum it super-imposes the additional amount, giving the plaintiffs in this case the total claim of $150,000.00. This is the amount of their satisfaction. It is true that the trebled portion of the judgment is punitive in nature and does not represent actual damages. Yet to hold that the plaintiffs are entitled to one dollar less than the full trebled damages of $150,000.00 would be a direct repudiation, or at least a contravention of the provisions of the statute under which this very cause was brought. The covenant not to sue may not be employed to shatter the clear intent of the statute. If the $20,000.00 sum were subtracted before trebling the verdict, the mature judgment, plus the partial settlement, could amount to an aggregate of no more than $110,000.00. This is only a fraction of the "one satisfaction" to which the plaintiffs are entitled under the Act.

The $20,000.00 sum must be credited to the defendant against the full claim of $150,000.00. To hold otherwise would perpetrate another instance in which a plaintiff has been deprived of a meritorious claim because he has received only partial satisfaction from other obligors.

Dated: This 9th day of November, 1955.

/s/ ERNEST A. TOLIN,
United States District Judge.

[Endorsed]: Filed November 10, 1955.

[Title of District Court and Cause.]

MEMORANDUM

Re Attorney Fees.

By virtue of the provision of §15, Title 15, U.S.C.A., the Court is required to fix a reasonable attorney fee to be recovered by plaintiffs. It was agreed by both parties that the Court should fix this fee without referring any matter in connection with it to the jury except, of course, that the factual dispute relative to cause of action was referred to the jury because recovery of the fee is only possible if the plaintiffs prevail in the principal action. The plaintiffs did prevail therein.

The Court finds that $25,000.00 is a reasonable fee in the premises and has inserted that amount in the form of Judgment which has been lodged by plaintiffs. The Clerk is directed to enter that Judgment.

Dated: This 9th day of November, 1955.

/s/ ERNEST A. TOLIN,
United States District Judge.

[Endorsed]: Filed November 10, 1955.

In the District Court of the United States Southern District of California, Central Division

No. 14350-T

ELMER LYSFJORD, et al.,

Plaintiffs,

vs.

L. D. REEDER CO. OF SAN DIEGO, et al.,

Defendants.

JUDGMENT AFTER TRIAL BY JURY

This action having been tried, and a general verdict for the plaintiffs with damages of $50,000 having been duly rendered on the 26th day of May, 1955, and the Court having been required to treble the amount of damages under the provision of Section 4 of the Clayton Act (15 U.S.C.A. 15) and to add thereto a reasonable attorney's fee and costs,

It is, therefore, adjudged that said plaintiffs recover of said defendant The Flintkote Company the sum of $150,000, together with the sum of $25,000 as and for a reasonable attorney's fee, and the sum of $165.70 for the costs of suit.

It is further adjudged that the defendant shall have as a credit against the portion of this judgment relating to damages in the sum of $150,000 the sum of $20,000 heretofore received by plaintiffs in these proceedings pursuant to the terms of a

covenant not to sue between plaintiffs and other parties formerly defendants in this case.

Dated: This 9th day of November, 1955.

/s/ ERNEST A. TOLIN,
Judge of the District Court.

Lodged June 10, 1955.

[Endorsed]: Filed November 10, 1955.

Docketed and entered November 10, 1955.

[Title of District Court and Cause.]

BILL OF COSTS

Judgment having been entered in the above-entitled action on the 10th day of November, 1955, against defendant, The Flintkote Company, the clerk is requested to tax the following as costs:

Fees of the clerk	$ 15.00
(Allowed)	
Fees of the marshal	90.70
(Allowed)	
Fees of the court reporter for all or any part of the transcript necessarily obtained for use in the case	449.20
(Disallowed, not for original)	
Fees for witnesses (itemized on reverse side)	40.00
(Allowed)	

Costs incident to taking of depositions..... 199.75
(Reporters costs on depositions. Amount stipulated $20 for original, rest for copies. $20 only allowed.)

Total $794.65

[Total Allowed]..... Taxed at $165.70

State of California,
County of Los Angeles—ss.

I, Alfred C. Ackerson, do hereby swear that the foregoing costs are correct and were necessarily incurred in this action and that the services for which fees have been charged were actually and necessarily performed. A copy hereof was this day mailed to McCutchen, Black, Harnagel & Greene, defendant's attorneys, with postage fully prepaid thereon.

Please take notice that I will appear before the Clerk to tax said costs on the 22d day of November, 1955, at 10:00 a.m.

/s/ ALFRED C. ACKERSON,
Attorney for Plaintiffs.

Subscribed and sworn to before me this 15th day of November, 1955, at Los Angeles, California.

[Seal] /s/ JOYCE B. BALDWIN,
Notary Public.

My Commission Expires Jan. 11, 1956.

Costs are hereby taxed in the amount of $165.70 this 22nd day of November, 1955, and that amount included in the judgment.

/s/ JOHN A. CHILDRESS,
Clerk.

On 11/22/55 at taxing, G. Richard Doty appeared for The Flintkote Co., & Alfred C. Ackerson for plfs.

Witness Fees (computation, cf. 28 U. S. C. 1821 for statutory fees)

Name and Residence	Total Cost Each Witness
Richard E. Howard	$4.00
A. D. Hoppe 2733 Riverside Drive, L. A.	4.00
G. H. Morris 911 N. Sycamore, L. A.	4.00
L. D. Reeder 2900 Rowena, L. A.	4.00
R. W. Downer 325 N. Hoover, L. A.	4.00
Gustave Krause 2316 San Fernando Rd., L. A.	4.00
Paul H. Denton 228 N. Vermont	4.00

Name and Residence	Total Cost Each Witness
Howard C. Smith 3337 Casitas Ave., L. A.	$ 4.00
Robert Arnett	4.00
Olli Granni	4.00
Total	$40.00

[Endorsed]: Filed November 16, 1955.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that The Flintkote Company, one of the defendants in the captioned action, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on November 11, 1955, and from the whole thereof.

McCUTCHEN, BLACK,
HARNAGEL & GREENE,

HAROLD A. BLACK,

G. RICHARD DOTY,

By /s/ HAROLD A. BLACK,
Attorneys for Appellant,
The Flintkote Company.

[Endorsed]: Filed December 8, 1955.

[Title of District Court and Cause.]

SUPERSEDEAS BOND

Whereas, on November 11, 1955, judgment was entered in the above-entitled action in favor of plaintiffs and against defendant, The Flintkote Company, in the sum of $155,000; and

Whereas, on November 22, 1955, the clerk of said court taxed plaintiffs' costs in the above-entitled action in the sum of $165.70; and

Whereas, defendant, The Flintkote Company, intends to appeal from said judgment to the United States Court of Appeals for the Ninth Circuit and desires that execution of and any proceedings to enforce said judgment be stayed pending the determination of such appeal;

Now, Therefore, Federal Insurance Company, a New Jersey corporation having its head office in New York City, New York, and being qualified to transact a surety business in the State of California, hereby acknowledges that it, its successors and assigns, is bound to Elmer Lysfjord and Walter R. Waldron, plaintiffs in the above-entitled action, their heirs, successors and assigns, in the sum of Two Hundred Thousand Dollars ($200,000.00) conditioned that if defendant The Flintkote Company (or Federal Insurance Company as its surety) satisfies the judgment in the above-entitled action in full together with costs (including such additional attorney's fees, if any, as the court may award by

reason of the appeal) interest and damages for delay, if for any reason its appeal is dismissed or if the judgment is affirmed, or satisfies in full such modification of the judgment and such costs, interest, attorney's fees, and damages as the appellate court may adjudge and award, then this bond shall be void; otherwise to be and remain in full force and effect.

Federal Insurance Company consents and agrees that in case of default or contumacy on the part of the principal or surety, the court may, upon notice to it of not less than ten days, proceed summarily and render judgment against Federal Insurance Company in accordance with its obligation and award execution thereon.

Dated: December 8, 1955.

[Seal] FEDERAL INSURANCE COMPANY,

By /s/ GLEN HUNTSBERGER, JR.,
Its Attorney in Fact.

State of California
County of Los Angeles—ss.

On this 8th day of December in the year one thousand nine hundred and fifty-five before me, Florence Graeszel, a Notary Public in and for the County of Los Angeles, residing therein, duly commissioned and sworn, personally appeared Glen Huntsberger, Jr., known to me to the the Attorney-in-Fact of Federal Insurance Company, the Corpora-

tion that executed the within instrument, and also known to me to be the person who executed the within instrument on behalf of the Corporation therein named and acknowledged to me that such Corporation executed the same.

In witness whereof, I have hereunto set my hand and affixed my official seal in the County of Los Angeles the day and year in this certificate first above written.

[Seal] /s/ FLORENCE GRAESZEL,
Notary Public in and for the County of Los Angeles, State of California.

My Commission Expires September 19, 1956.

Examined and recommended for approval as provided in Rule 8.

/s/ ALFRED C. ACKERSON,
Attorney for Plaintiffs.

I hereby approve the foregoing. Dated this ..... day of December, 1955.

/s/ LEON R. YANKWICH,
Judge.

[Endorsed]: Filed December 8, 1955.

[Title of District Court and Cause.]

STATEMENT OF POINTS ON APPEAL

Defendant-appellant The Flintkote Company hereby designates the following as the points on which it intends to rely on its appeal herein:

1. The court erred in denying defendant's motion for a directed verdict at the close of plaintiffs' case.

2. The court erred in denying defendant's motion for a directed verdict at the close of all the evidence.

3. The court erred in denying defendant's motion for judgment non obstante veredicto.

4. The court erred in denying defendant's motion for a new trial.

5. The court committed substantial and prejudicial errors of law in the course of the trial in connection with the admission of evidence.

6. The court committed substantial and prejudicial errors of law in the course of the trial in connection with the period for which damages might be recovered in this action.

7. The court committed substantial and prejudicial errors of law in the course of the trial in connection with its instructions to the jury.

8. The court erred in its determination of the effect of the payment of $20,000.00 to plaintiffs by

former defendants in this action in consideration of the execution by plaintiffs of a covenant not to sue.

9. The court erred in fixing the amount awarded to plaintiffs in respect of their attorney's fees.

10. The verdict of the jury is not supported by legally sufficient evidence.

11. The court lacked jurisdiction of the subject matter of the action.

McCUTCHEN, BLACK,
HARNAGEL & GREENE,

HAROLD A. BLACK,

G. RICHARD DOTY,

By /s/ HAROLD A. BLACK,
Attorneys for Defendant-Appellant, The Flintkote Company.

Affidavit of service by mail attached.

[Endorsed]: Filed December 20, 1955.

[Title of District Court and Cause.]

STIPULATION AND ORDER EXTENDING TIME FOR FILING RECORD ON APPEAL AND DOCKETING APPEAL

It is stipulated by and between plaintiffs-appellees and defendant-appellant The Flintkote Company, through their respective counsel, that the time within which the record on appeal must be

filed and within which the appeal must be docketed pursuant to the notice of appeal filed by defendant-appellant The Flintkote Company on December 8, 1955, be extended to and including January 31, 1956.

Dated January 16, 1956.

/s/ ALFRED C. ACKERSON,
Attorney for Plaintiffs-Appellees.

McCUTCHEN, BLACK,
HARNAGEL & GREENE,

HAROLD A. BLACK,

G. RICHARD DOTY,

By /s/ G. RICHARD DOTY,
Attorneys for Defendant-Appellant The Flintkote Company.

It is so ordered this 16th day of January 1956.

/s/ ERNEST A. TOLIN,
Judge.

[Endorsed]: Filed January 16, 1956.

[Title of District Court and Cause.]

DOCKET ENTRIES

1952

July 21—Fld complt Sherman Anti-Trust Act. Issd sums. Md JS 5 report.

1952

Aug. 1—Fld Sums. retn svd. as to L. D. Reeder Co. & L. D. Reeder, Harold E. Shugart Co., A. D. Hoppe, Paul H. Denton Co., Acoustical Contractors Assn., of So. Calif., Gus Krouse, Carroll Duncan, R. E. Howard, Roy Downer Co., & The Flintkote Co.

Aug. 8—Fld stip. & ord. thereon that defts. Acoustical contractors Assoc. of Sou. Calif. Inc. & R. E. Howard Co. have to & incl. 9/9/52 to appr.

Aug. 20—Fld stip. & ord. thereon that svce of sums. & compl. has been made on The Harold E. Shugart Co. Inc. & no svce on Diamond Head Screw Corp. or Joseph, Inc., that allegations as to Diamond Head Screw Corp. or Joseph, Inc., be deemed an allegation as to The Harold E. Shugart Co., Inc. & that defts The Harold E. Shugart Co., Inc. & G. H. Morris may have to & Incl. 9/9/52 to appear.

Aug. 20—Fld not. of defts Acoustical Contractors Assoc. of Sou. Calif. Inc. of Taking of depos of pltfs Elmer Lysfjord & Walter R. Waldron.

Sept. 9—Fld ANSWER of defts L. D. Reeder Co., R. E. Howard Co., R. W. Downer Co., Coast Insulating Products, Carroll Duncan db/a Acoustics, Inc. L. D. Reeder, Re. E. Howard, Roy Downer, Jr., Charles L.

1952

Newport, Gus Crouse, & Acoustical Contractors Assoc., of Sou. Calif., Inc., (formerly known as Acoustical Contractors Assoc. of Sou. Calif., Inc.). Fld ANSWER of defts. Paul H. Denton & A. D. Hoppe dba The Sound Control Co.

Sept. 9—Fld ANSWER of G. H. Morris & The Harold E. Shugart Co., Inc. Fld mot & not of mot. of deft The Flintkote Co. for more def. stmt, retble 9/29/52 at 10:00 AM with memo of pts & authos in sup. thereof.

Sept. 10—Fld stip & ord. thereon re cont. of depositions.

Sept. 24—Fld stip. & ord thereon that Mot. of Deft. for more Def stmt be contd from 9/29/52 to 11/3/52 at 10:00 AM.

Oct. 14—Fld mot & not of mot of plfs for prod of docs. retble 10/27/52, 10 AM., with memo of pts & auths in sup thereof.

Oct. 17—Fld defts objs to mot for prod of documents for inspection, etc.

Oct. 20—Fld defts objs to mot for prod of documents for insp., etc.

Oct. 27—Ent order striking plf's mot for production of documents for inspection, copying or photographing, off calendar.

Nov. 3—Ent ord striking mo of dft Flintkote Co. for more definte stmt off cal, and to be reset on 10 days' notice.

1953

Jan. 28—Fld mot & not of mot of plfs for leave to file 1st Amended Compl, retble 2/9/53, 10 AM. LODGED 1st Amended Compl with demand for jury trial thereon.

Feb. 9—Ent ord hrg on plfs mot for lv to file 1st amend compl cont to 3/16/53, 10 AM. Counsel notif.

Feb. 20—On ct's own mot ent ord advancg hrg on plfs mot for lv to file amend compl to 2/24/53 fr 3/16/53.

Feb. 24—Ent ord mot for lv to file 1st amend compl is grtd. Fld amend compl.

Feb. 26—Fld plfs not of grntg lv to file 1st amend compl.

Feb. 26—Ent ord on ct's own mo vac ord of 2/24/53 grantg plf lv to file amend compl, & ent ord restoring mo of plf to amend to cal Judge Tolin for 3/16/53. (C) Notif counsel.

Mar. 11—Fld oppos of cert dfts to plfs mot for lv to file 1st Amend Compl.

Mar. 13—On ct's own mot hrg on plfs mot for lv to file 1st amend compl set for 3/16/53 is cont to 3/23/53, 10 AM. Counsel notif.

Mar. 23—Ent ord grtg plfs mot for lv to file 1st amend compl. Plf counsel to draw formal ord.

Mar. 26—Fld ord grantg lv to file 1st Amend Compl.

1953

Apr. 15—Fld mot & not of mot of Flintkote Co. for sep stmt, more of def stm, to strike & dism retble 4/27/53 at 10 AM w memo of pts & authos in sup thereof.

Apr. 15—Fld stip & ord thereon re motions.

Apr. 24—Fld stip & ord thereon cont hrg on mot of deft The Flintkote Co for sep stmt etc. to 5/11/53.

May 7—Fld plfts oppos to mot of Flintkote Co for sep stmt & paragraphing more def stmt etc.

May 11—Ent prcdgs hrg deft Flintkote's mot for more def stmt to strike etc. Ent ord takg mots for more def stmt, separate stmt of claims & mot to strike under subm. Ent ord denyg mot to dism.

May 13—Ent ord defts mots req plf to mk sep stmt of claims for more def stmt & to strike cert portns of 1st amend compl htf taken under subm on 5/11/53 be & hereby are denied. Counsel notif.

May 18—Fld ans of defts Paul H. Denton Co, Paul H. Denton & A. D. Hoppe dba The Sound Control Co to 1st amended compl.

May 20—Fld ANSWER of defts L. D. Reeder Co of San Diego R. E. Howard Co, R. W. Downer Co, Coast Insulating Product Acoustics, Inc, L. D. E. Reeder, R. E.

1953

Howard, Roy Downer, Jr., Carroll Duncan, Chas. L. Newport, Gustave Krause & Acoustical Contractors Assn of So Calif to 1st amended complt.

May 21—Fld pltfs interrogs propd to deft Flintkote Co. (ex parte) Atty for Flintkote moves for extension time sd deft to ans ent ord Flintkote hv 20 days fr and after 5/23/53 to file its answer.

June 3—Fld stip & ord thereon that deft the Harold E. Shugart Co hv to & incl 6/15/53 in wh to ans 1st amend complt.

June 9—Fld mot of deft Flintkote Co for enlrgmt of time to ans 1st amend compl together with memo of pts & auths in suppt thereof & ord thereon that mot be heard 6/11/53 at 10 AM (Y) & svce of mot to be made not later than 12 noon Wed 6/10/53.

June 10—Fld deft Flintkote Co's affid of svce of mot for enlrgmt of time etc as to Alfred C. Ackerson. Fld deft Flintkote Co's mot & not of mot retble 6/22/53 at 10 AM for (1) to strike & dism or (2) to compel ans to interrogs (3) to enlarge time to ans 1st amended complt together with affid of G. Richard Doty memo of pts & auths in suppt thereof.

June 11—Ent procs (Y) hrg mot deft Flintkote fld 6/9/53 for enlargmt time to ans. Ent ord sd deft hv until 5 PM 6/25/53 to ans.

1953

June 13—Fld notice of entry of order denyg mo for sep stmt etc.

June 15—Fld ANSWER of defts G. H. Morris & the Harold E. Shugart Co. to 1st amended complt.

June 16—Fld ANSWER of pltfs to interrogs of deft Flintkote Co. Fld stmt of Walter R. Waldon adopting answers of pltf Lysfjord to deft Flintkote Co's interrogs.

June 17—Fld pltfs oppn to mot of deft Flintkote Co. to strike or disms or to compel ans to interrogs.

June 22—Ent proc hrg mot of deft Flintkote Co to strike and dismiss or to compel answer to interrogs & to enlarge time to answer 1st amend compl & ent ord deny sd mot w/o prej to submisn of fur interrogs (BH).

June 26—Fld ANSWER of Flintkote Co to 1st amended complt.

July 31—Fld dktd & ent stip & ord dism w/o prej as to defts L. D. Reeder Co. of San Diego, R. E. Howard Co, The Harold E. Shurgart Co, Inc., R. W. Downer Co, Coast Insulating Products, A. D. Hoppe, The Paul H. Denton Co, Acoustics, Inc., L. E. Reeder, R. E. Howard, G. H. Morris, Roy Downer, Jr., Carroll Duncan, Charles L. Newport, Gustave Krause, Paul H. Denton, Acoustical Contractors Asson of Sou Calif Inc, et al, and w/o costs.

1953

Aug. 18—Fld interrogs propd to deft Flintkote Co by pltf Nos. 1 thru 13.

Aug. 19—Fld pltfs mot & not of mot retble 9/28/53, 10 AM for prodn of docmts together with memo of pts & auths in suppt thereof.

Aug. 25—Fld stip enlarging time to ans interrogs by deft Flintkote Co to 10/1/53 & ord thereon.

Oct. 1—Fld stip & ord thereon that deft Flintkote Co hv to & incl 10/15/53 in wh to ans interrogs Nos. 1 thru 13.

Oct. 16—Fld ans deft the Flintkote Co. to interrogs Nos. 1 thru 13. Fld interrogs prop to pltfs by deft Flintkote Nos. 32 thru 73.

Oct. 26—Fld pltf's stip & ord thereon that pltfs may hv to & incl 11/15/53 in wh to serv ans to "Interrogs propounded to pltfs by deft Flintkote Co."

Nov. 17—Fld stip & ord thereon that pltfs hv to & incl 12/7/53 in wh to ans defts interrogs.

1954

Mar. 1—Fld admission of rect of copy of ans of plfs to deft Flintkote Co's interrogs. Fld plf's ans to interrogs propd by deft Flintkote Co.

Mar. 13—Mld notice to counsel placg on settg cal 4/5/54 at 10 AM.

1954

Mar. 25—Fld deft Flintkote Co's not of mot retble 4/5/54 at 10 AM for ord reqg proper ans to interrogs; with memo of pts & auths in suppt thereof.

Apr. 5—Ent procdgs hrg deft Flintkote's mot for ord requiring proper ans to interrog. Ent ord Ct will draw ord re determintn whether plfs ans are satis or not. Ent fur ord settg for trial off cal.

July 30—Ent ord deft Flintkote's mot for ord requiring ans to Flintkote's interrog. Nos. 39 thru 73, htf taken under subm, is denied without prej to Flintkote to submit fur more specific interrog covering the same subjects. Counsel notif.

Oct. 7—On cts own mot ent ord settg case for trial 4/19/55, 10 AM.. Counsel notif.

Oct. 8—Fld plfs not of taking depos.

1955

Jan. 5—Fld stip & ord thereon that trial now set for 4/19/55 be contd to 4/26/55 at 10a.

Feb. 3—Fld Deposn of Robt E. Rayland tkn 10/23/54.

Mar. 11—Ent ord (ct's own mot) trial contd fr 4/26/55 to 5/4/55, 9:30 AM. Counsel notif.

Apr. 26—Fld Not of takg depos & to prod docs at the takg of depos.

Apr. 29—Fld Jury instrs requested by pltfs.

1955

May 3—Fld defts proposed jury instrns.

May 4—Ent prcdgs jury trial. Jury impaneled. Ent ord fur trial cont to 5/5/55 10 AM.

May 5—Ent prcdgs fur jury trial. Sw 1 wit for plf. Fld 14 exbs for plf. Ent ord fur trial cont to 5/6/55 9:30 AM.

May 6—Ent prcdgs fur jury trial. Fld 14 exbs for pfl. Fld 4 exbs for dft. Ent ord fur trial cont to 5/9/55 2 PM. Fld dft Flintkote's memo of pts & auths on effect of "Covenant not to sue."

May 9—Ent prcdgs fur jury trial. Sw 7 wits for plfs. Fld 8 exbs for plf. Fld plfs memo re measure of damages (1) as to time that can be covered & (2) as to type of evid to prove unliquidated damages. Fld Flintkote's supl memo of pts & auths on effect of "Covenant not to sue" & memo of pts & auths on the recoverability of damages occurring after institution of action. Ent ord fur trial cont to 5/10/55 1:30 PM.

May 10—Ent prcdgs fur jury trial. Fld 1 exb for plf. Ent ord fur trial cont 5/11/55 1:45 PM. Fld Flintkote's memo of pts & auths in reply to plfs memo re measure of damages, etc.

May 11—Ent prcdgs fur jury trial. Sw 1 wit for plf. Fld 5 exbs for plf. Fld 4 exbs for deft. Ent ord fur trial cont 5/12/55 1:30 PM.

1955

May 12—Fld plfs prof of antitrust case by circumstantial evid. Ent procdgs fur jury trial. Ent ord fur trial contd 5/13/55 1:30 PM.

May 13—Ent proc fur jury trial. Fld 1 exb for plf. Plf rests. Atty for deft moves for directed verd & to strike cert evid. Ent ord rulg on sd mots & fur trial cont to 5/17/55, 1:30 PM. Fld deft Flintkote Co's memo of pts & auths in suppt of mot for directed verdict & to strike cert evid. Fld deft Flintkote's memo of pts & auths in reply to plf's memo in oppon to mot for directed verdict.

May 16—Ent procs fur jury trial. Ent ord defts mot for directed verdict & mot to strike cert evid is denied. Sw 1 wtn for deft. Fld 1 exb for deft. Ent ord fur trial cont to 5/17/55, 1:30 PM.

May 17—Ent proc fur jury trial. Fld 5 exbs for plf. Ent ord fur trial cont 5/18/55, 2 PM.

May 18—Ent procs fur jury trial. Sw 1 wit for deft. Fld 1 exb for plf. Ent ord fur trial cont 5/19/55, 1:30 PM.

May 19—Ent prcdgs fur jury trial. Sw 3 wits for dft. Fld 1 exb for dft. Ent ord fur trial cont 5/20/55, 1:30 PM.

May 20—Ent fur prcdgs jury trial. Sw 4 wits for dft. Ent ord fur trial cont 5/23/55, 10:30 AM.

1955

May 23—Ent prcdgs fur jury trial. Sw 1 wit for deft. Ent ord fur trial cont 5/24/55, 1:30 PM.

May 24—Ent prcdgs fur jury trial. Fld 3 exbs for dft. Sw 1 wit for dft. Atty plf moves to amend prayer amend compl, mot grtd. compl amended by interlineation. Both sides rest. Atty for dft renews mot for directed verd & to strike cert evid ent ord mots ea of them denied. Ent ord fur trial cont 5/25/55, 2 PM. Fld deft Flintkote's prop jury instrcs (revisions & withdrawals).

May 25—Ent prcdgs fur jury trial. Ent ord fur trial cont 5/26/55, 9:00 AM.

May 26—Ent prcdgs fur jury trial. Jury retns verd fv plfs & against deft, awarding plfs $50,000. Fld verd.

June 1—Ent ord fur hrg on determination of treble damages, attys fees & form of judgt to be ent on cal 7/8/55, 1:30 PM.

June 1—Fld stip & ord for withdrawal of plfs exb 42 (Genl Ledger) Ledger released to Walter R. Waldron. ld deft Flintkotes mot & not of mot retlbe 7/8/55, 1:30 PM for jdgmt NOV & for new trial with memo of pts & auths in suppt thereof.

June 10—Lodged (3) proposed judgts after trial by jury of plfts. Lodged plfs proposed judgt for attys fees & costs.

1955

June 15—Lodged plfs jdgmt after trial by jry. Fld plfs suppl memo re disposn of partial settlemt of case. Fld plfs memo re defts (right to deduct payment of $20,000 for jdgmt). Fld plfts petn for atty fees & costs.

June 20—Fld stip & ord thereon that defts other than The Flintkote Co paid to plfs sums of $20,000 upon delivery to sd defts of convenant not to sue, dtd 7/31/53 attached to defts memo of pts & auths on effect of "Convenant Not to Sue" fld 5/4/55.

June 30—Fld deft Flintkote's supplmtl memo of pts & auths in suppt of Mot for jdgmt N.O.V. Fld deft Flintkote's supplemtl memo of pts & auths in suppt of Mot for new trial. Fld their affid of svce thereon. Fld Deft Flintkote Co's 2nd supplemental memo of pts & auths on effect of covenant not to sue.

July 5—Fld deft Flintkote's memo of pts & auths re attys fees & costs.

July 8—Lodged deft's proposed judgt after trial by jury. Ent prcdgs hrg defts mot for judgt notwithstanding verd & mot for new trial. Ent ord sd mots denied. Ent ord plfs petn for attys fees & costs & determn. of effect of paymt of $20,000 on covenant not to sue stand subm.

1955

Nov. 10—Fld memo of decision re effect of pymt of $20,000 on covenant not to sue. Fld memo of decision re: attys fees. Mld cys to counsel. Fld, dktd & ent judg fv plfts against deft The Flintkote Co. the sum of $150,000.00 and atty fees of $25,000.00 together with costs, sd deft to hv credit on sd judg in sum of $20,000.00 htf pd plf etc. Not attys. JS6.

Nov. 16—Fld plfs Bill of Costs.

Nov. 22—Taxed costs by clk on hrg at $165.70, & ent in judgmt.

Dec. 8—Fld Appellants not of appeal (Deft The Flintkote Co). Mld copy to Alfred C. Ackerson Rm 770, 417 S. Hill St., LA 13, Calif. Fld supersedeas bond.

Dec. 20—Fld deft-appelt's stmt of pts on appeal & designation of contents of rec on app.

1956

Jan. 5—Fld ptlf-appellees' design of add'l record on appeal.

Jan. 16—Fld stip & ord thereon extending to & incldg 1/31/56 time for deft-appellant to file record on appeal & for docketing appeal.

Jan. 17—Fld ord for flg of cert deft's req. jury instrucs & cert of plfs substd prop jury instrucs nunc pro tunc.

In the United States District Court
Southern District of California
Central Division

No. 14,350-T

ELMER LYSFJORD, et al.,

Plaintiffs,

vs.

L. D. REEDER CO. OF SAN DIEGO, et al.,

Defendants.

Honorable Ernest A. Tolin, Judge Presiding.

REPORTER'S TRANSCRIPT OF PROCEEDINGS
(In Chambers)

Appearances:

For the Plaintiffs:
ALFRED C. ACKERSON.

For the Defendant The Flintkote Company:
McCUTCHEN, BLACK, HARNAGEL & GREENE, By
HAROLD A. BLACK, and
G. RICHARD DOTY.

May 4, 1955—9:20 A.M.

The Court: Good morning, counsel.

I will make a brief statement of what the Court understands counsel have presented in chambers this morning in advance of the beginning of the

case, Mr. Black having asked for a conference in chambers.

Now, gentlemen, if I mistate or don't fully state what has gone on before, please fill me in, because I want the record to be complete on it.

This action was commenced against several defendants. All but one have been subject to an order of dismissal, which was entered upon stipulation of the parties for dismissal. The particular defendant before the Court today, not being a party to that stipulation or to the order, is The Flintkote Company.

It has now been brought to the Court's attention for the first time that those defendants who were the subject of the order of dismissal paid $20,000.00 to the plaintiffs in exchange for a covenant not to sue further. The question arises as to how this matter shall be brought to the attention of the jury, if at all.

The Court understands it is to be the agreement of the attorney for the plaintiffs and the attorney for the defendant Flintkote, that Flintkote, being the defendant on trial [B*] today, that the Court at the time of impaneling the venire, inform the prospective jurors of the fact there has been a settlement of the action as between the plaintiffs and all defendants except the defendant Flintkote, but the Court shall not state the monetary consideration, keeping that away from the attention of the jury.

The Court will, of course, give the usual state-

***Page numbering appearing at top of page of original Reporter's Transcript of Record.**

ments concerning the rules applicable, that the fact of settlement by these defendants who have settled, does not create an inference against the defendant on trial, just by the reason of the mere fact of settlement, and the jury is not to infer anything for or against either of the parties to the controversy to be tried today merely because certain of the persons who were former parties to the suit have settled their dispute.

Have I said it correctly?

Mr. Black: The further statement that similarly the fact that those parties made a settlement does not create an inference that they themselves were liable in any way.

The Court: Yes. I think that should be included. I had that in mind when I said I would state the usual rules applicable to situations of this kind.

Mr. Ackerson: I think it should be stated, also, Your Honor, there can be no inference drawn—they should not consider the fact of the amount of settlement, and there [C] should be no inference drawn that any portion of the total liability was paid, any particular portion of the total liability. They are not to concern themselves with that.

The Court: In questioning the venire I will attempt to cover what each of you have just stated, and if I do not do it fully, don't be backward about reminding me. I don't think you will be, but I will just state now for the record that you are invited to point out any deficiencies in the questioning.

I want both sides to feel that the jury is properly impaneled and its members properly informed of

the matters you have just brought to my attention.

Mr. Ackerson: Along that line, there is a question I usually like to have asked in a case of this type, where so many parties are involved, and that is to the effect of whether or not any of the panel are acquainted with or have had business relations with, and so on, either me, Mr. Black or any of the defendants or the plaintiffs.

For your convenience I have drawn up a list so you wouldn't have to refer to a number of documents to get them. This thought occurred to me last night.

Mr. Black: We had exactly the same thought.

The Court: It occurred to me on Sunday.

Mr. Ackerson: We had drawn up a proposed draft of this statement to the jury regarding the settlement. I don't know whether Mr. Black would prefer to have it or if that would be [D] a convenience to you.

Mr. Black: I think the Court has covered the matter.

Mr. Ackerson: I think it is covered. It is just as a matter of convenience.

The Court: I think juries stay awake longer if a judge can get himself into sufficient frame of mind to ad lib these.

Mr. Black: Yes, they are infinitely more effective.

Mr. Ackerson: I think so, too.

The Court: I tried to do it that way. If it appears, as we go along, my language is unfortunate,

please point out wherein it can be improved or corrected.

Another matter counsel have presented is the question of opening statements. Mr. Ackerson, of course, expects to give an opening statement immediately after the jury has been sworn to try the case, it being understood that the lengthy Complaint and Answer need not be read to the jury by the judge or clerk.

Mr. Black, for the defendant, feels that he should at that time, that is, immediately after Mr. Ackerson has finished his opening statement, point out to the jury the points which have been alleged by the plaintiffs, which the defendant denies, but not give a summary of what he expects to prove, other than to state what is in issue at that time, but to give a full defendant's opening statement after the plaintiffs have completed the presentation of their evidence. [E]

Now, have I stated that correctly, gentlemen?

Mr. Ackerson: That is satisfactory.

Mr. Black: Yes, that is my understanding.

The Court: That will be deemed a stipulation then?

Mr. Ackerson: Yes.

Mr. Black: So stipulated.

Mr. Ackerson: There is one other question. I don't know whether it is necessary or not. We still have a conspiracy here and co-conspirators in the form of these defendants who have been dismissed. I am wondering whether or not it would, just for the purposes of the record, that the Complaint may

be deemed to have been amended to use the word "co-conspirators" with reference to these contractors, wherever we have designated them as defendants.

Do you think that would clarify that?

The Court: You are undertaking, I take it, Mr. Ackerson, to bring to the minds of the jury these defendants, although they have been dismissed, are still claimed to be conspirators?

Mr. Ackerson: Are still conspirators, in the same sense they were as defendants.

Mr. Black: Well, I have no objection to that in principle, but I am not sure that mechanically that quite achieves it, without examining the text of it. It might produce some really curious grammatical statements. [F]

Mr. Ackerson: We could limit the stipulation to a stipulation between counsel, then these dismissed defendants can be——

Mr. Black: Can be referred to——

Mr. Ackerson: Yes.

Mr. Black: ——without admitting——

The Court: That would be the law and would be necessary.

Mr. Ackerson: It would be necessary.

Mr. Black: Yes.

The Court: Even if counsel didn't agree, I think the Court would have to do that.

Mr. Ackerson: That is undoubtedly true.

Mr. Black: I think in that same connection it now appears that it would be almost imperative that plaintiffs' instructions be recast.

Mr. Ackerson: A few of them will have to be recast.

Mr. Black: Because in some instances we even have a situation where you tell the jury that they could find against some but not all the defendants, which, of course, now becomes——

Mr. Ackerson: There are about six instructions, I believe, that will have to be. I am in the process of doing that.

The Court: We will not reach the instruction problem this week. [G]

Mr. Black: That is right.

Mr. Ackerson: I thought that could be done over the week end.

Mr. Black: Similarly, we have an instruction on this covenant not to sue, which, obviously, will have to be withdrawn. That can be done later.

The Court: Before the arguments commence, I think we will have to have an instruction conference.

Mr. Black: Very well.

The Court: I don't follow the custom, or I haven't heretofore, that some of the judges do, of going over each individual instruction. That can become an interminable thing.

I remember a case we had before Judge O'Connor, in which the instruction conference took about three days. It is just an invitation to everyone to debate every instruction, and the first thing we know we are beginning to debate instructions that were withdrawn by Judge James, when all of us were young, probably not yet members of the Bar.

But I think we ought to have a conference which will aim at, as the mechanic would say, getting the bugs out of the charges that have been submitted.

Mr. Black: That might be highly desirable.

The Court: There is one thing about the Court simply letting jurors be excused, where perhaps the law would not. I notice that the statute says, "No juror shall be excused [H] because of hardship, unless it be an extreme hardship."

I have always taken the attitude that if a juror has some particular event, either occurring or about to occur in his life or family, personal life, which would be such that his mind would tend to drift toward that, and he would find it difficult to give the case full attention, that I just excuse him.

I ask a general question, if anyone called that day has that situation. Only once did I find what I thought was a taking advantage of it, when half the courtroom got up and walked out. Only once did they do it. Generally, they are pretty conscientious.

Mr. Ackerson: I think so.

The Court: A couple of weeks ago on impaneling a jury in a lands case in Fresno, I made that kind of a statement and two of the jurors got up and made little statements about their being very interested in a particular irrigation hearing which was being conducted in another room of the building, and that they were directly affected by the results and might at some time possibly be witnesses, although they hadn't been subpoenaed, and so I excused them right off.

And then counsel came running up and took an exception to my having done so, because the panel, they said, was so small, they wanted jurors to be excused only where the law required it. [I]

I thought I would inquire of you now, before we get into the courtroom, if you have any objection to my being conservatively liberal——

Mr. Ackerson: I have none.

Mr. Black: I have none.

The Court: ——on excusing jurors who might have other things on their minds.

Mr. Black: I have none.

Mr. Ackerson: I have none, either.

The Court: Is there anything else we should confer about?

Mr. Black: Yes, there is one other subject I think we should perhaps bring up at this time, and that is the matter of how to deal with the law issues and the equitable issues if we get there in this case.

As Your Honor knows, this case is for damages and an injunction. I think, under the authorities, it is very clear that the issues are not identical on those two matters.

And that, further, the equitable issues, if any remain, should be, in the normal course, handled by the Court, without the jury, after the jury has found on the non-legal issues.

Specifically, under the law issues, it is irrelevant as to what has been going on since the filing of the complaint with respect to conspiracies and restraints and what not. Whereas, under the equitable issues, that is one of the most [J] important things

the Court has to decide, as to whether there is still a threat of a conspiracy and so forth.

I think it is confusing to the jury to have those two things interwoven at a single trial.

Mr. Ackerson: I would suggest that we proceed, more or less normally dispose of the liability and the damage question. I agree that after that is disposed of, why, any question of injunction can be decided by the Court.

Mr. Black: And perhaps if additional testimony, in the Court's discretion, he feels is needed, it can then be offered.

Mr. Ackerson: Yes.

The Court: It might occur that you will have a witness here on the stand who will have finished testifying as to all that he should on the law issue and counsel would feel that they would like to ask a few questions while the witness is present, and which might tend to confuse the issue if that evidence be heard by the jury, but you would like to get it in while the witness is here, without having to bring him back.

If any such situation occurs, we can take such testimony while the jury takes a recess.

I take it that any particular enlargements of testimony relating to the equitable issues, which would come in under the procedure just suggested, would be brief.

Mr. Black: I think so.

The Court: And if you have any extensive questioning of [K] any particular witness, it would be

necessary, or, that might be taken up after the jury has retired.

Mr. Ackerson: I think so.

Mr. Black: I think we can safely leave that to Your Honor's discretion.

Mr. Ackerson: I doubt, it would be improbable that the situation would arise, but it may.

Mr. Black: I think it can be dealt with in that fashion. Counsel on both sides thought it more convenient to bring the witness back, we would perhaps be entitled to do that.

The Court: You don't like to have the jury just sitting in the jury room, that is, for long periods of time. It is to everyone's interest to keep the jury in a good frame of mind.

Mr. Black: Yes. We have a motion on that subject. For the record, does Your Honor feel it is desirable to present it on the matter of separate trial? Perhaps, for the record, it is just as well to make that motion. I don't think there will be any opposition to it.

The Court: It is being filed now?

Mr. Black: Yes, it is being filed now.

Mr. Ackerson: I move the Court that each side be permitted five challenges, peremptory challenges.

The Court: Any objection, Mr. Black? [L]

Mr. Black: No objection.

The Court: Motion granted, five peremptory challenges.

With respect to the motion to separate legal and equitable issues for trial, the Court will receive all evidence as to all the issues seriatim, that is, one

witness after another, and if it becomes appropriate to separate the examination of a particular witness, reserving part of it until after the jury has retired, we will do that.

If it becomes appropriate to excuse the jury briefly, while we take a few questions from a witness, whose prolonged attendance would not be necessary to the trial of the equitable issues, we will follow that method.

In other words, we will try to have the Court assimilate the equitable issues, the evidence applicable to the equitable phases of the case, from the general presentation, and we will then supplement it by taking further evidence after the retirement of the jury, if that becomes indicated.

Mr. Black: There will be no objection to that procedure.

Mr. Ackerson: No objection.

The Court: Are there any other issues we ought to take up now?

Mr. Ackerson: I think that covers it.

Mr. Black: That covers it.

(Whereupon, at 9:35 o'clock a.m., Wednesday, May 4, 1955, an adjournment was taken.)

May 5, 1955—10:00 A.M.

The Court: Good morning.

The jury and alternates being present, the litigants here, you may proceed with your argument —I don't mean your argument. I mean your opening statement.

Mr. Ackerson: I will try not to make it argumentative.

The Court: For your information, we will take the morning recess at exactly 11:00 o'clock.

Mr. Ackerson: May it please the Court, Mr. Black, Mr. Doty, ladies and gentlemen of the jury, as His Honor explained to you yesterday, it is customary in a case like this for counsel to give what is known as an opening statement.

And you will also recall that His Honor told you what I have to say here this morning is, of course, not evidence, and that it is not to be considered by you as evidence.

The purpose of an opening statement is to let the jury know what each side intends to prove by competent evidence, so that you can better follow that evidence and evaluate it as it comes in.

It is also to enable you to get abreast of the problem which you ordinarily don't do up to this stage of the game.

Also, what I say here, other than what the charge is, will be based, in my opinion, upon the evidence which you [2*] will hear throughout this case. I want that understood, without repeating it every other sentence, as I go through here. Sometimes you say the evidence will prove or the evidence will show, and the statements I make, other than a reference to the Complaint in this case, I am telling you now, in my opinion, that the evidence will sustain.

Now, I think in order to understand this case I should, to begin with, state the evidence which we

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

think will pertain to the industry as a whole, that is, the manufacturing industry, including the defendant Flintkote, and the manner of distribution, because this evidence will show that the principle competitive tile, that is, the type of tile is rather limited, both as to source and as to application.

Now, His Honor called your attention to this tile in the building here, and if I consider my client an expert, I have to disagree with His Honor. My client tells me this is very excellent, specialty tile.

The Court: I was just being, speaking facetiously. Unless we are facetious once in a while, these proceedings get awfully dull.

Mr. Ackerson: Yes, Your Honor. The purpose of my being a little facetious this morning is this is not the competitive tile we are talking about. The competitive tile involved in this case is the type of tile you see in office buildings, chain stores, hospitals, schools, and so on. It [3] is that 12 by 12 perforated tile you see on the ceilings, and it is the common type, in other words.

Now, in that connection the evidence will show that the vast majority of acoustical tile jobs done in this area and other areas, the specifications requiring that tile to have what they call an A.M.A. rating. Now, A.M.A. stands for American Materials Association, I believe, or American Acoustical Association. Anyway, it is a grading organization, composed of manufacturers, technicians, and so on, and they rate the tile for its sound-deadening abilities.

So I believe the evidence will show that in this

area the manufacturers who supply that type of tile which will meet the specifications of the great majority of the jobs is manufactured by about five acoustical tile manufacturers, other than the defendant Flintkote. And this Flintkote tile, that we are talking about, does have an A.M.A. rating and is acceptable to architects and general contractors alike. [4]

Now this tile, Flintkote tile, is manufactured in Hilo, Territory of Hawaii, and is sold ordinarily to acoustical contractors, such as my client Mr. Waldron and his partner, Mr. Lysfjord.

This sale is made in what we call a drop shipment in the grocery field, or something of that type of industry. In other words, it is purchased by these acoustical tile contractors in carload lots, it is shipped direct, we will say, from Hawaii, by both being consigned directly to, as in our case, the aabeta company. Then it is unloaded by regularly established trucking lines into the aabeta company's warehouse or the acoustical contractor's warehouse who purchased it. That is true, generally speaking, of each of the other manufacturers. They sell direct to acoustical tile contractors in carload lots.

The evidence will likewise show that on this 12x12 one-half inch acoustical tile, just a common competitive variety, and without which an acoustical tile contractor couldn't operate competitively, that the competitive price for that tile is identical with each manufacturer regardless of the source of the manufacturing facilities. Each of the plaintiffs' competitors, the evidence will show, regardless of

their source of the tile, whether it was Flintkote, Armstrong, U. S. Gyp, National Gyp, Firtex, or the rest of them, that they each could buy this necessary tile at, I [5] believe, 10 cents a square foot.

Now in 1950, '51 and '52, the crucial period here, the evidence will show that all of these manufacturers of this A.M.A. approved tile sold exclusively to one or more members of the Acoustical Tile Contractors Association, which is one of the alleged co-conspirators here.

In many instances the manufacturer would sell to one of these members of this Association, who also could purchase one or more other brands of the same tile from competitors of the manufacturer. Thus the evidence will show that at the time Flintkote agreed to sell tile to the plaintiffs here they were at the same time selling that tile to Howard & Company, one of the other named co-conspirators.

Howard & Company also had U. S. Gypsum tile, a competing brand, and both brands were acceptable on these public building projects constituting most of the tile work.

Flintkote likewise sold—and I could be wrong on one of these names but not numbers—I believe it sold at the same time to Acoustics, Inc., another alleged co-conspirator, and I believe that Acoustics, Inc., likewise had a competitive brand of tile, that is, competitive to Flintkote's tile.

Mr. Black: Pardon me, Mr. Ackerson. I don't suppose it matters but that came after the events.

Mr. Ackerson: Who was it?

Mr. Black: Sound Control. [6]

Mr. Ackerson: Thank you, Mr. Black. I was a little bit doubtful.

At that time it was Sound Control who was likewise an alleged co-conspirator.

I believe that Flintkote at that time had a third outlet for its tile in this area, the name of which I am not certain.

Can you help me on that, Mr. Black?

Mr. Black: Coast Insulating.

Mr. Ackerson: Coast Insulating was the third one, and Coast Insulating is likewise named as a co-conspirator.

Now I believe Coast Insulating likewise handled the tile of Flintkote's competitor.

So here you had three competitors of the plaintiffs, who had a choice of what tile they could put into a building, they had two brands of approved tile, they could use either Flintkote's tile or they could use Armstrong tile or U. S. Gyp tile, whichever happened to be the other brand.

Now before I progress chronologically, the alleged members of the Acoustical Contractors Association were those same names which His Honor read to you ladies and gentlemen yesterday. Perhaps I might just repeat the company's names so that you might keep them in mind.

They were the L. D. Reeder Company, R. E. Howard Company, The Harold E. Shugart Company, the R. W. Downer Company, [7] Coast Insulating Products, A. D. Hoppe, doing business under a fictitious name, Paul H. Denton, Acoustics, Inc.

Now this Association was formed I believe sometime in the latter part of 1951, but I think the evidence will show that prior to that time there was an informal organization, unincorporated, at which these same people attended regular meetings, and I believe the evidence will show further that at these meetings the price to be charged by acoustical contractors to public builders, general contractors, was fixed and set by mutual understanding.

I believe further that the evidence will show along that line that they published a regular markup price list to be followed by acoustical tile contractors in submitting bids.

At the same time and during this informal stage of this association, the evidence will show that the system worked something as follows: that these so-called competing tile contractors would submit their bids in advance to a man who was employed by the group. That man would automatically eliminate the low bid and award the bid to the second low bidder.

That went on for a little while until they became more formal. After that the evidence will show there was an absolute allocation of bids. [8]

In other words, the bids were rotated. They were allocated. Sometimes without respect to any bona fide bid at all. If it was Downer's turn to get a bid, they got it.

The competing tile contractors had a formula or a number or a percentage, but whatever it was it meant that when they found out what Downer had bid, the other company would increase their bid three and one-half per cent and another com-

pany would increase their bid seven and one-half per cent, so that Downer had to be low.

That was the general operation that acoustical tile contractors industry engaged in when these plaintiffs attempted to enter the business. Let's see if we can progress a little farther here.

The Complaint in this case alleges, to state it very succinctly and to state the main purpose and charge, the others which I may go into a little further, but basically this Complaint charges that the acoustical tile contractors, operating in this manner, after my clients had received their first carload of Flintkote tile, conspired with and obtained Flintkote's agreement to aid them in this scheme, and to eliminate the competition, with this scheme, of my clients, by having Flintkote agree with them they would refuse to sell my clients any more tile.

Now, let's go to the evidence relating to—and I might add there that the evidence should show why Flintkote did [9] this. The Complaint alleges they did it for the purpose of perpetrating this monopoly among the acoustical tile contractors and the general system of distribution here.

I don't expect Mr. Black to be in this Court and admit that. But the evidence is going to be evaluated by you.

Some of that evidence will be this: It will show Mr. Waldron here has been in the acoustical tile business in one form or another for about 17 years. I don't think he looks that old, either, but he has.

During a part of that time he was an applicator.

In other words, he actually put it on the ceilings and walls.

Subsequently he became one of the best acoustical tile salesmen in the area. He worked for, I believe, Shugart Company. He worked for Coast. At the time he tried to go into business for himself he was working for the R. W. Downer Company.

During that period with the Downer Company, at least, Mr. Waldron was making in excess of a thousand dollars a month in commissions. And his duties were simply that he was not an employee, that he worked on a straight commission basis, without regard to time clock or anything else.

He was a free-lancer with his efforts going to the Downer Company, and the same thing had been true with the Shugart Company. And that is the general relationship of an acoustical tile salesman here to any particular company. [10]

The evidence will show further, with respect to Mr. Waldron, that during this long period of association, work in the acoustical tile field, he, like other salesmen, had built up many contacts with general contractors to whom they sold their product. And to make it clear, the evidence will show that the only way these acoustical tile contractors operate is to keep track of the Greene Sheet, which is a publication here announcing future bids by general contractors, asking for subcontracts like acoustical tile, perhaps plumbing, wiring, and so on.

Then the subcontractor, the acoustical contractor submits a bid, ordinarily, and that is the way he gets his work. It is the salesman, however, who

computes the bid and it is a sales job. I mean he tries to get lower than his competitors and still get the job and make money for the company, because if the company doesn't make money he doesn't make money, and I think the evidence will further show if he turns in a job, a bid that loses the company money, at least so far as Mr. Waldron, Mr. Lysfjord are concerned, they had to make up their share of the loss.

Now, Mr. Lysfjord hasn't been in this business quite as long as Mr. Waldron, but he has been in it for ten years and his experience practically parallels that of Mr. Waldron.

He, likewise, at the time they both attempted to go into business, was one of the top salesmen for Downer Company. [11] He made a salary comparable or he made commissions comparable to that of Mr. Waldron. And he likewise had built up many contacts with general contractors throughout this area. Some of their names will be mentioned to you. There was Jackson Bros., for instance, who built perhaps half the chain markets around here, including other large types of buildings.

There was Hagen-Lee, who built an entire industrial suburb out near Inglewood. That is just an example of the type of their activity.

I think Mr. Charles Lee in the firm likewise is the architect and perhaps builder for many of our newer theatres in the area.

Mr. Lysfjord and Mr. Waldron for many years prior to 1951, when Flintkote accepted them as dealers, had desired to go into the acoustical tile con-

tracting business, but being experts in the field, they had been—I mean even though they were experts in the field with a following, they were unable to get a manufacturer's line.

The accredited tile that was sold here was sold, as I have told you before—the only way they could get it was to get somebody to add them to their list. That they did with Flintkote.

In any event, the evidence will show that they did make efforts, they had thought about it for years, and the beginning of the connections with Flintkote comes out of their [12] experience in this field, too.

There is a man named Robert Ragland, who at that time was an employee or a promotion man, or some such position in Flintkote, in the acoustical tile field.

Robert Ragland had worked with both of these men, I believe, at the Shugart Company. He knew them. He was personally friendly with them.

When Robert Ragland quit his job with Shugart and went to work for Flintkote these plaintiffs felt they had a friend there, someone who could get them in.

And the conversations, preliminary conversations were between Mr. Lysfjord and Robert Ragland. I don't believe that Mr. Waldron had many of these, engaged in many of these preliminary conversations. They started perhaps as early as June, 1951, and they consisted principally of Lysfjord asking Ragland to help him get Flintkote to give them an accredited regular line of supply.

After numerous conversations and so on, I think the evidence will show that Ragland knew they were good men. He felt that Flintkote ought to have them on their team, and after so many of these conversations—Mr. Waldron was brought into them, too.

The first conversation, where other officials of Flintkote participated, was out at a restaurant on Western Avenue, I believe, called the Manhattan Club. During a [13] luncheon engagement there Mr. Lysfjord, Mr. Ragland and Mr. Ragland's immediate superior, Mr. Baymiller, attended. And at this meeting the plaintiff Lysfjord and these three people went over Lysfjord's background and Waldron's background, their financial status, their ability to bring in trade to Flintkote, and so on.

Now, I don't know whether it was at that meeting or a subsequent meeting that either Mr. Baymiller or Mr. Ragland brought out the fact that they weren't adequately represented over in Riverside and San Bernardino Counties. And the plaintiffs' evidence will show these plaintiffs did agree that if they were made regular dealers of the Flintkote, they would attempt to cover that area, too.

About a week after this meeting I am talking about, and that must have been sometime the latter part of November of 1951, but, in any event, a few days thereafter there was another meeting at the same place.

This meeting was attended by the same three people, that is, Ragland, Baymiller, Lysfjord, and also

by Waldron and Thompson, a superior of Baymiller at Flintkote, so you had five people there.

At this meeting much the same conversation took place. The whole background of the plaintiffs was reviewed for Mr. Thompson's benefit. Their financial status was gone into.

At that meeting also Mr. Thompson wanted to know if they would cover both areas, and my clients said yes. [14]

The meeting lasted some minutes, during the luncheon hour at least, and it was arranged that my clients, Mr. Lysfjord and Mr. Waldron, would meet those three people at the offices of Flintkote and they were assured at this meeting quite emphatically that they had an excellent chance of getting the line of tile.

So about a week after that the plaintiffs did attend this meeting at Flintkote's offices. They were met by Mr. Ragland, Baymiller and Thompson, and at this time they had brought a financial statement with them, and I believe that financial statement will show assets of somewhere around $50,000 and the details of those assets.

When they came in the door and were met by these three gentlemen, they were told they were in. They were introduced to Mr. McAdow. Mr. McAdow is the credit manager there. And I believe they left this financial statement with him.

Then they were taken again to what I think was the top man at Flintkote, a man named Mr. Harkins, and either Mr. Baymiller or Mr. Thompson or Mr. Ragland took them in there, introduced them

as their new account, and left them there to talk with Mr. Harkins.

At this conversation Mr. Harkins congratulated them. He told them that Flintkote was constantly improving their tile, there should be many years of amicable relationship, [15] and the usual congratulatory language that the big boss would give somebody starting a business for the first time.

At this meeting I believe also Mr. Harkins told these gentlemen, these plaintiffs, about a large roofing order. Flintkote handles more than just acoustical tile, they are big dealers in roofing material and other matters. And Mr. Harkins took the trouble to tell these plaintiffs about a roofing project that Flintkote Company had either sold or was going to sell, and I believe if I recall correctly it was the Ryan Aircraft Building somewhere out near Pomona.

He suggested that these plaintiffs sharpen their pencils and go after the acoustical tile in that building.

That is about what happened. The two plaintiffs went away, and at that time they were acoustical tile dealers for the Flintkote line. They had no other line. They didn't try to get another line because Flintkote is a complete line in itself and it qualifies.

Within a very few days thereafter—and I forgot one other thing on that last meeting at the Manhattan Club—at that meeting I believe there were ideas brought to the attention of these Flintkote officials concerning stationery, and these matters, while seemingly trivial at the time, I am sure will

have significance when you hear the evidence in the case.

At any rate, at this meeting the question of stationery was called to their attention, and I believe Mr. Lysfjord or [16] Mr. Waldron had an idea of advertising on each letterhead. In other words, they listed their products down the margin and so on like that. The Flintkote people thought it was a good idea.

So after this Harkins meeting, Mr. Lysfjord inquired of Mr. Ragland about using a Flintkote cut on their stationery. They were very happy to supply it.

The first cut furnished by Flintkote was too large. Subsequently another cut was sent to the Atlantic Avenue address, that I am going to speak of in a minute, by Mr. Ragland or somebody at Flintkote. That cut was used on the first stationery printed by the aabeta company, which is the name, you will recall, of the plaintiffs' company.

On that stationery was printed a San Bernardino address, a Los Angeles address, the products I believe, and it is quite a fancy piece of stationery which will be shown to you. The calling cards had the same data on them.

I believe that somewhere around the 1st of December, or right around the 1st of December, Mr. Waldron, who terminated his relationship with the Downer Company, I believe, on December 31st, commenced organizing the aabeta company. He looked for a lease, he looked for building requirements, which was warehousing principally.

He found a small warehouse after some difficulty out on Atlantic Avenue, I think it was 7300 or some such number [17] Atlantic Avenue. It was about 1000 square feet.

He also somewhere in January began looking for a place in San Bernardino to cover that end of the territory.

Mr. Lysfjord at that time was still on the payroll or still working for Downer & Company in the manner I have described. He agreed to stay with that company until the end of January, and I believe he did so, but as I told you it wasn't a time-clock job so he likewise was active at the same time in setting up his own company.

Up to December 11 I believe they had made certain contacts in San Bernardino, they had no office or warehouse space, and in Los Angeles I believe they did have this Atlantic Avenue warehouse and were occupying it. They made arrangements for stationery but as yet they had ordered no tile.

On December 11, 1951, just a few weeks after this last meeting at Flintkote when they were accepted as dealers, Mr. Ragland came out to the Atlantic Avenue address and told these gentlemen that the Hilo plant was going to be closed down for repairs and for them to get an order in fast so they wouldn't be caught without tile when they were ready for it.

I think that meeting came about by Ragland calling Mr. Waldron at San Bernardino; he was over there trying to get connections. He called Mr. Lysfjord at the Downer Company I believe and

they agreed to meet at this Atlantic Avenue [18] warehouse. They did.

On the way in or after he got there, Mr. Lysfjord bought an order pad. They hadn't even got their regular stationery yet. On that order pad the original order for Flintkote tile was placed.

Ragland took it back to the office and it was delivered along about January 4 of 1952.

Now there are a few significant things in connection with that purchase. A carload of acoustical tile I believe is something like 60,000 square feet. It could even be 6000 square feet, but I am not an expert in that yet.

What is a full carload?

Mr. Waldron: 60,000.

Mr. Ackerson: 60,000 square feet more or less.

The little 1000-foot warehouse on Atlantic wouldn't hold a carload. Mr. Waldron was associated with the California Decorating Company in San Bernardino. He was an honorary officer for doing decorative work for them or giving them decorative ideas at times, is the way I understand it, but he felt, since you had to have a place to send this tile at the time you ordered it, he gave Ragland the address of the California Decorating Company for delivery of that tile, and it was actually delivered there, and the invoices of Flintkote will so show.

Now we get on to the delivery date of this tile the [19] first part of January. In between then and December 11th the telephones had been connected or ordered for the Bell address on Atlan-

tic Avenue. Arrangements had been made to publish a fictitious name under which you do business. I don't know whether you all understand that, but we have a law that gives certain advantages and certain disadvantages if you use a name like aabeta company without publishing it and showing who the owners are.

Either Mr. Waldron or Mr. Lysfjord had made arrangements for the publication of a fictitious name in Los Angeles County here, and in San Bernardino County. They had arranged for things like trucking, stationery, they had contacted people and I think there had even been a few bids made in this area.

That brings us up to another point I think that I forgot in that last meeting at the Manhattan Club. That was an important meeting. At that meeting Mr. Waldron expressly asked Mr. Thompson a question, whether or not Flintkote could be influenced by any objections from existing acoustical tile contractors, and he warned Mr. Thompson that there would be objection when they found out that these plaintiffs were in business.

Mr. Thompson assured them that Flintkote was big enough to take care of itself.

Now we have these people in the Atlantic Avenue address, and I think somewhere around January 1st or 2nd they did succeed in getting a larger place in San Bernardino. [20-21]

When this deal was delivered to California Decorating Company it was diverted to the address on Waterman Avenue, I believe it was, over there,

which was the warehouse these plaintiffs had acquired by that time.

Things went on in the usual manner then. They were sort of in business. Mr. Waldron worked very hard over in the San Bernardino area getting connections with contractors. He was unacquainted over there.

I think Mr. Ragland gave him some contractors, the names of some contractors with which he wasn't acquainted here. And he gave him a list of contractors put out by The Flintkote Company, a mimeographed list of contractors in San Bernardino-Riverside Counties, Palm Springs, and so on.

Mr. Waldron was over there busy making those contacts, establishing a bank account, telephone listings, and so on.

At the same time the same things were a little farther advanced here. I believe they were even submitting bids here. Then we rock along, shall we say, until this magical date somewhere around February 19th or 20th; I think we could place that date. On that date Mr. Lysfjord had severed his connections with the Downer Company and was devoting full time here.

Mr. Waldron, of course, had been devoting his full time to aabeta co. since January 1st, at least.

On that date, Mr. Waldron was again contacted in San [22] Bernardino and told to come up for a meeting. Mr. Lysfjord was contacted likewise. The meeting was held at the Atlantic address of the aabeta co.

At that meeting the Flintkote representatives in-

volved were the same three, Ragland, Baymiller and Thompson. There was no written communication in connection with this meeting at all. They called up and asked for an appointment.

Mr. Waldron came in a little late. Nothing was much said until he got there. When he got there it was announced Flintkote would no longer sell them tile.

When pressed for a reason, they stated, "Well, there are objections to you doing business around Los Angeles."

Mr. Waldron said, "The pressure really must be great."

Baymiller said, "We had pressure all right, but it is out of our hands. We are following orders. That is all."

That is the last tile they got. There was never an official notification, I mean in the ordinary sense of giving a reason in writing or even a written firing. There is no document on that.

Now, that notification that there would be no more tile from Flintkote, the first thing the plaintiffs did, of course, was that they were stuck on a year's lease at the San Bernardino warehouse. They had no further use for it. They had no tile to sell. They immediately went over and notified the contractors that they had contacted there of [23] what had happened, and told them and thanked them, and said, "But we can't submit the bids we have promised." They cancelled out telephone connections, bank account, and all of the results of the work of Mr. Waldron in the prior month or so.

They really had no use for this Los Angeles warehouse as acoustical tile arrangements, so far as they were concerned, but they did have these bids they had made to use up the first carload of tile.

And you must understand that you don't bid today and start installing it tomorrow. Sometimes there is a lag of two or three months. You get the bid and it will be ready to put in when the general contractor gets around to.

So during the first six months of 1952 they had most of that carload of tile installed. And in the meantime, in order to keep their skeleton crew together, to keep this one office running, they resorted to installation of hard wall plastering. I think it is a substitute for regular three-coat plastering.

They had gone into bidding on jobs that required carpentry work and almost anything else for which they were not fitted, in order to keep going. And they have managed to keep going until today. But they have had to resort to one other tactic to keep going until today, and that is buying tile from their competitors at enhanced prices or buying it from lumber yard dealers at enhanced prices. [24]

The tile they have purchased since their contact with Flintkote was broken, they have had to pay from 17 to 25 per cent markup on it to get it, and then turn around and try and compete with the competitors who are paying that much less. That was another disadvantage in being cut off from Flintkote.

It is impossible and it has been impossible for these plaintiffs to bid on any sizable job. In other

words, they couldn't utilize their contacts with Hagen-Lee, Jackson Bros., and all these contractors, that they had been used to doing business with and depending on because they couldn't guarantee to have the tile when the job was ready. And that, of course, is in addition to it.

So they have been restricted more or less to high-priced tile on small private jobs or small jobs where they had, they would personally do it, and where they could charge the price and come out even on it, at least.

There are other elements of damage which will be reverted to in the course of the testimony, but I want to give you just a general idea of what the plaintiffs think this case is about.

Now, I will finish this opening statement by merely again stating to you ladies and gentlemen of the jury that I have been talking to you from memory. It is my memory of the evidence. It may vary slightly. It may vary in many [25] spots from the actual evidence.

Of course, my speech again is not to be considered by you ladies and gentlemen of the jury as evidence in any way. I thank you.

Mr. Black: If the Court please, Mr. Ackerson, ladies and gentlemen of the jury, when it comes time for the defendant to make an opening statement it is customary to do that either at the conclusion of the plaintiffs' case or at the conclusion of the plaintiffs' statement at the beginning of the plaintiffs' case.

In a case that is apt to be a long trial, such as this, it is customary for the defense to reserve its opening statement until the opening of the defendants' case, because otherwise so much testimony has been introduced by the plaintiffs' side that it is not quite reasonable to suppose that the people on the jury will remember the defendants' version of the case that far back.

It is not permissible to split the opening statement in any detail. In this instance, however, the Court and counsel have very graciously consented to allow me just very briefly to state, without attempting in any way to review what our evidence will show, the points of difference between us, so that you may have a conception of some of the basic issues that are disputed in the case.

I shall do that in just a very few moments, because I do [26] not intend at this time, as I have said, to review the evidence we propose to put on when it comes our time to introduce witnesses.

Most of what Mr. Ackerson has said about the industry generally, the nature of the product, the number of people engaged in industry are not in dispute.

The basic issue between us is whether there was any unlawful conspiracy or combination in restraint of trade. As to whether any such conspiracy existed between the acoustical tile contractors, this defendant has no knowledge or information.

It emphatically denies it ever participated in any such combination or if any such combination existed,

that it had any knowledge whatever of its existence.

The position of this defendant in this case is that it made this arrangement with the plaintiffs in this case to take on a line of acoustical tile in the San Bernardino and Riverside area under the expressed understanding that that area was the only area in which there was sufficient room to operate. That the Los Angeles metropolitan area was already adequately taken care of by the existing distributors of the Flintkote product.

It was on that distinct understanding these arrangements were made. They were in the form of a loose, informal understanding. There was no definite contract as to quantities, [27] as to term or duration. It was an arrangement which obviously was terminable at the pleasure of either side.

Later, after the arrangement started, it is the position of the defendant Flintkote Company it came to its knowledge and information that contrary to this expressed understanding the plaintiffs were actively operating in the Los Angeles metropolitan area.

After discussing the matter in the Flintkote circles, it was decided that in that situation there was nothing to do but to terminate this relationship. That was thereupon done, and that was the reason why it was done, solely as a matter of the business judgment and policy of The Flintkote Company.

It is not denied there were complaints made by the other Flintkote dealers in the area, that these people, without any prior notice to them, were com-

ing into this area and competing on the same line of tile.

But it is the position of this defendant that it acted in that connection on its own responsibility and as a matter of its own business judgment, that in no way at any time that it participated in any unlawful conspiracy or combination. That is in general the basic issue between us in this lawsuit.

Thank you very much.

The Court: Now, members of the jury, it might be helpful [28] to you to hear the portion of the statute which is involved in the case, because it would be very simple, in light of the alleged facts, for you to be noting evidence as it comes in, in the light of a theory that this is a breach of contract suit. It isn't a breach of contract suit at all. It is a suit under the antitrust laws.

The portions of the antitrust laws which relate to it are very simple. We start out with the basic laws. The Court will read you all that I feel pertains to the case at the close of the case. But just at the start we will go back to what would be parallel to the Ten Commandments, that is, to the basic law with respect to antitrust actions.

There is a statute known as the Sherman Act, which probably all of you have heard of, even though you have all said you do not have any particular acquaintance with antitrust laws. The Sherman Act is one of the basic antitrust laws. The Clayton Act is another. I think it will suffice to read you a portion of the Sherman Act. That Act provides:

"Every contract combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal * * *

"Every person who shall monopolize, or combine or conspire with any other person or persons to monopolize any part of the trade or commerce among the several states * * *."

is doing an illegal act. [29]

Reading further:

"Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any District Court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover * * * the damages by him sustained * * *"

So this suit is not a contract action, nor is it a criminal action in which the Government is seeking to obtain punishment or legal redressment against some concern alleged to have violated the antitrust laws. It is a case in which these two plaintiffs claim that they have suffered damage as a result of acts which come within the general character of the acts prohibited by the portions of the Sherman Act which the Court has just read to you.

For the present, this being the beginning of the trial and not the instructions, was the statement of the Court and its reading of the Act sufficient or should it be amended or supplemented?

Mr. Ackerson: I think it was sufficient, Your Honor.

Mr. Black: I don't believe it requires amplification, Your Honor, at this time.

The Court: Thank you. We will take our morning recess. [30]

(Short recess.)

The Court: The jury and the alternates are present, and counsel are here.

May it be understood that the jury and alternates are always present unless someone calls our attention to the fact that there is an absence?

Mr. Black: So stipulated.

Mr. Ackerson: So stipulated.

The Court: Thank you.

Proceed with the case.

Mr. Ackerson: I will call Mr. Waldron.

Mr. Black: Mr. Waldron, before you start to testify, may I ask you to remember that I am a long distance away from you, it is a big courtroom and I would like to hear everything you say.

Mr. Waldron: I will do my best, Mr. Black.

Mr. Black: Thank you, sir.

WALTER R. WALDRON

called as a witness by and in behalf of the plaintiffs, having been first duly sworn, was examined and testified as follows:

The Clerk: Your full name, please?

The Witness: Walter R. Waldron.

The Court: Mr. Waldron, I didn't really mean

(Testimony of Walter R. Waldron.)

to cast reflections on this tile. It is probably very good, but [31] somehow either the design of the room or the size of the room makes it very difficult for people to be heard when they speak in ordinary conversational tones, and when some are removed quite a few feet from the others. You are inclined to be a soft-spoken gentleman. Just forget that characteristic while you are testifying.

The Witness: I am sure I will forget occasionally, but if you will point at me I will try to raise my voice.

The Court: Any jurors or counsel or the parties who do not hear either this witness or any other witness or the Court at any time—I tend to drop my voice, too—just speak up and we will try to correct it.

Proceed.

Direct Examination

By Mr. Ackerson:

Q. You are Walter R. Waldron, one of the plaintiffs in this case? A. Yes, sir.

Q. Mr. Waldron, how long have you been associated with the acoustical tile business?

A. Since the spring of '34, 1934.

Q. What were you doing at that time?

A. Application.

Q. By "application" you mean actually putting it in the buildings? [32] A. Installing.

Q. Installing it? A. Yes.

(Testimony of Walter R. Waldron.)

Q. And how long did you continue to do that type of work?

A. Until about 1946 or '47.

Q. And theerafter you did what?

A. Sales work.

Q. Who did you first start selling acoustical tile for?

A. A firm by the name of Allied Construction Industries, that didn't remain in business very long.

Q. And how long were you with them?

A. Only a few months.

Q. Then where did you go?

A. To Coast Insulating Products.

Q. And that would be when, about the same year, '46? A. I think that was in early '48.

Q. And did you perform the position of salesman for Coast? A. Yes.

Q. How long did you remain with them?

A. Until the latter part of 1950, somewhere in September, 1950.

Q. And where did you operate as salesman for Coast? [33] A. Here in Los Angeles.

Q. What did you do after you left Coast?

A. I went with the R. W. Downer Company, the same type of business.

Q. And did you remain with the R. W. Downer Company until you quit to go into business for yourself? A. Yes.

Q. And you were a salesman at the R. W. Downer Company? A. That is right.

(Testimony of Walter R. Waldron.)

Q. Then I take it you never did work for the Shugart Company?

A. My first experience was with the Shugart Company from 1934 to 1946 or '7.

Q. That was as an applicator? A. Yes.

Q. Now, Mr. Waldron, I used the term "AMA," or American Materials Association. Will you explain what that term means?

A. Acoustical Materials Association.

Q. Acoustical Materials Association?

A. Yes.

Q. What is the significance of that organization? Just tell us what it is and what it does.

A. Yes. It was set up to have materials tested for their rating and noise reduction, and they use one testing [34] firm—I can't recall the name of it at the moment—but all these people submit samples to this one firm and they are tested and given a rating, and we refer to it as the AMA rating. They publish a yearly results on that. [35]

Q. And in your experience as a salesman, have you run across this AMA rating in the sale of tile?

A. Oh, yes. You mean do I find requests for it?

Q. Yes. Do you find requests or what effect does this AMA rating have in your work as a salesman?

A. Well, the architects request tile equal to AMA rating in their acoustical installations.

Q. In other words, the architects put that in their architectural plans to the general contractors?

A. That is in the specifications written up by the architect.

(Testimony of Walter R. Waldron.)

Q. Is that the general practice, to your knowledge, or is that occasionally, or what?

A. No, it is very constant. They all want that rating. They want to be sure of it.

Q. Have you ever tried to sell a tile that did not have an AMA rating in a public bid job or a job that just had an architect work on it?

A. I have submitted material to try and get approved, but it didn't have the AMA listing, so they wouldn't let us bid the material, without an AMA rating.

Q. You say that is the general practice?

A. Yes.

Q. Now, Mr. Waldron, at the time you and Mr. Lysfjord went into business together, if you know, who were the then present [36] dealers or contractors using Flintkote tile?

A. That was R. E. Howard Company and Sound Control Company, Coast Insulating Products.

Q. Now, do you know whether or not Howard Company also handled another brand of tile?

A. Yes, they handled U. S. Gypsum products.

Q. Is that a tile comparable to Flintkote?

A. Yes, it has an AMA rating.

Q. What about Sound Control, did they handle another type of tile?

A. Yes, they handled National Gyp.

Q. Does that tile likewise have an AMA rating?

A. Yes.

The Court: Now, Mr. Witness, you are tending

(Testimony of Walter R. Waldron.)

to use terms that are familiar to the trade, "National Gyp."

The jurors aren't in that trade.

The Witness: I am sorry.

The Court: Let's take a little more time and be a little more explicit.

Q. (By Mr. Ackerson): In other words, when you used the term "U. S. Gyp." you mean U. S. Gypsum Tile?

A. I think they call it United States Gypsum Company that produces an acoustical tile, among other things.

Q. The same thing with "National Gyp," you meant National Gypsum Company? [37]

A. Yes.

Q. You mentioned one other, Coast Insulating Products, as being a Flintkote dealer at that time. Did they likewise handle another tile?

A. Yes, they had Simpson Logging Company products. Simpson Logging Company makes an acoustical tile and it has an AMA rating.

Q. What other brands of tile were sold in this area which likewise had an AMA rating?

A. Armstrong Company's acoustical tile.

Q. Who dealt in Armstrong tile, what contractor?

A. R. W. Downer and L. D. Reeder Company at that time, and Denton Company, too, I believe.

Q. Three. They had three Armstrong dealers at that time then?

A. That is my knowledge.

(Testimony of Walter R. Waldron.)

Q. Do you know whether or not either of those three companies handled an additional brand of AMA tile?

A. R. W. Downer Company had on their stationery Fir-Tex products, but in my experience we used very little of it; with them, I mean.

Q. Who handled Fir-Tex, was that also an AMA tile? A. Yes, it is.

Q. Was it sold in this area? A. Yes. [38]

Q. To whom was it sold?

A. I believe Acoustics, Inc., handled that, among others, at that time.

Q. What are the names of other acoustical tiles? Are there any other brands?

A. The Celotex products, and the Johns-Manville products. And I believe that covers it. I believe we covered those with the contractors I mentioned.

Q. Who handles Celotex?

A. That is the Harold E. Shugart Company.

Q. Who handles Johns-Manville?

A. Johns-Manville have their own outlet. They handle it themselves.

Q. Are they both AMA approved tile?

A. Yes.

Q. Is that right, approved, or is it rated?

A. I imagine rating or approved, either one, would be correct there.

Q. Now, Mr. Waldron, I would like to call your attention, if I may, to your contacts with Flintkote Company, in any effort you personally made or par-

(Testimony of Walter R. Waldron.)

ticipated in, looking toward getting the supply of their tile for you and Mr. Lysfjord.

You recall when and where you first conversed with any representative of Flintkote Company on that subject?

A. I believe that was at the meeting with three of [39] their people and my associate and I.

Q. Do you recall where that occurred?

A. Yes, I think that was the—that was the Manhattan Supper Club; lunch.

Q. When was that, approximately?

A. That was early in November of '51.

Q. Had you attended any prior meetings to that time? A. Well——

Q. I believe you stated that was the first one.

A. I think Elmer and I and Bob Ragland were together on one or two occasions; that was rather early there. I don't know the time. But Mr. Lysfjord was working with that more vigorously than I, during the early stages.

Q. Yes. Now, can you tell us, in your own words, what transpired at this Manhattan Supper Club meeting?

A. That meeting was for the purpose of establishing us as a Flintkote dealer, contractor, and we were assured at that time that we would become a Flintkote dealer.

Mr. Black: That is objected to, if the Court please. That is a conclusion of the witness.

The Court: The answer is stricken. I think the question was proper but, Mr. Witness, just for your

(Testimony of Walter R. Waldron.)

information, because you are not used to being a witness, witnesses can tell what was said but they can't tell the result or conclusion of what was said. That is, you said you were assured. [40]

The Witness: I see.

The Court: Now, that is your idea of it. Perhaps when the jury hears what was said, they might think you were assured, and they might think it was simply a maybe or they might think it was a no.

So you tell us conversations. While we hope this trial isn't going to last a great length of time, we are not in a rush. You take whatever time that is necessary to give us these conversations, and think what you are going to say before you say it. [41]

Q. (By Mr. Ackerson): I think you had better state who attended again and then just state the best you can the substance of what each party said.

A. The people that were there were Mr. Ragland, Mr. Baymiller and Mr. Thompson, and Lysfjord and myself.

As near as I can remember, they discussed our background and had us present volume of work that we had been doing in the Los Angeles area, and wondered if we could continue to do that and hold that volume and hold the people that we were working with at the time.

Q. Who inquired about that?

A. Mr. Thompson talked and led the conversation.

Q. Did you say anything further?

A. Yes. I told him I was sure we could hold the

(Testimony of Walter R. Waldron.)

volume that we had been doing and could probably do better.

Q. How did you apprise him, if you did, of the volume you had been doing?

A. I didn't get the question.

Q. How did you notify him or tell him of the volume which you had been accustomed to doing?

A. We had with us some contracts covering certain volume, quite large volume of work at that time, and they looked them over and the people that we were doing business with, that these contracts was from, and they covered something [42] like $40,000 or $50,000 worth of work that was signed up that last month. And they thought if we could continue with those people with that sort of business among others why that would be to their delight.

Q. Now you still can't get over this habit of saying "they thought." Did they say that?

A. Yes, they wanted us to go ahead like that.

Q. Was any other subject discussed by either of you there at that time?

A. Yes, they wanted us to bring a financial statement in.

Q. Who requested that?

A. Mr. Baymiller—no, I believe Mr. Thompson did.

Q. Anything else said?

A. Yes. They wanted us to cover the eastern part of the town and state along with our Los Angeles ac-

(Testimony of Walter R. Waldron.)

tivities as soon as we could do so. They weren't getting adequate coverage in that area, they thought.

Q. What did you say, if anything?

A. We told them that we would do so, after we got established and we could handle it, we would do so.

Q. Do you recall anything else in connection with that conversation?

A. We brought up the fact that they would cause a lot of ill feelings among the general acoustical contractors [43] in the city as soon as they learned that we were in business.

Q. Who brought that up? A. I did.

Q. What did you say?

A. I told them that they were organized here and they didn't plan to have or would be very unhappy if they had a competing contractor in the field because they weren't competing with each other any more.

Q. Did anyone make any other comment on that? Did you get a reply?

A. Mr. Thompson assured us that no amount of pressure would intimidate The Flintkote Company, that they were too big for that.

Q. Was there anything said about your handling only Flintkote line of tile?

A. No, at that moment I can't remember of any restrictions put on our activities.

Q. Was there anything said by either Messrs. Baymiller, Ragland or Thompson concerning where

(Testimony of Walter R. Waldron.)

you were to operate other than what you have stated?

A. No. They wanted us to take care of San Bernardino, Riverside, the eastern part of the state, if we could, and we assured them we were pretty sure we could, in addition to the Los Angeles area.

Q. How long would you say this meeting lasted? [44]

A. I would say about an hour. We had lunch there.

Q. How did the meeting break up?

A. In very friendly terms. They told us we could rest assured that we would be their acoustical outlet and that they were happy that they had one outlet that had only one acoustical tile, which was theirs, to sell.

The Court: Now, please, you say "they told us." I don't think they stood up and talked like a Greek chorus. Some one of them told you.

The Witness: I am sorry.

The Court: So let us get away from trying to condense things too much. Get a little more detail in because the jury is going to have to be instructed at the close of the testimony that witnesses can't form conclusions, that they will take the specifics which the witnesses have said and not the generalities. So let us have that question read, and then the witness may answer it again.

(The question referred to was read by the reporter as follows: "Q. How did the meeting break up?"

(Testimony of Walter R. Waldron.)

The Witness: Well, Mr. Thompson was doing most of the talking and I am sure that he would be the one that said that they were happy that they had one firm that just sold their tile alone. [45]

Q. (By Mr. Ackerson): Mr. Thompson or anyone else say anything about a subsequent meeting at this time, about meeting again?

A. Yes, they wanted us to come again.

Q. Don't say "they." Who said it?

A. Mr. Thompson arranged to have another meeting at a later date as soon as we had our financial statement worked out.

Q. And I believe you placed the date of this meeting that you are talking about as somewhere in November?

A. The latter part of November.

Q. When did you next see, if you did see, either of these three gentlemen from Flintkote?

A. In their office in the latter part of November.

Q. About how many days after this meeting that you have related?

A. I think a week or 10 days.

Q. Now, will you state what occurred on that occasion and who attended?

A. Mr. Baymiller and Mr. Ragland and Mr. Thompson were there, Lysfjord and I.

Q. Can you just state what you said, what either or all three of those people said, and what transpired?

A. We were introduced at that time, and we had our financial statement, to Mr. McAdow, their credit

(Testimony of Walter R. Waldron.)

manager, [46] and then—I don't remember the words—we had general conversation outlining the progress of our future, and I believe Mr. Lysfjord had a form of stationery to be worked up, and asked their opinion.

Q. Whose opinion did you ask?

A. Mr. Baymiller and Mr. Ragland.

Q. Then I take it you met, you and Mr. Lysfjord came in, and you said you were introduced—to whom? A. To Mr. McAdow.

Q. And you mentioned a financial statement.

You have seen this, Mr. Black?

Mr. Black: Yes, we have seen that.

Mr. Ackerson: Let me have this marked for identification.

The Clerk: Plaintiffs' Exhibit 1 for identification.

(The document referred to was marked Plaintiffs' Exhibit No. 1 for identification.)

Q. (By Mr. Ackerson): Is this the financial statement which you had prepared and submitted at this time or is it the copy of it?

A. Well, that is either it or a copy. I think there were two or three made.

Mr. Ackerson: Now I will offer that at this time if there is no objection.

Mr. Black: I presume it is the same. [47]

Mr. Ackerson: It is the same, Mr. Black.

Mr. Black: No objection.

(Testimony of Walter R. Waldron.)

(The document heretofore marked Plaintiffs' Exhibit No. 1 for identification was received in evidence.)

Mr. Ackerson: I will let the juror pass that around, if you wish.

(The exhibit referred to was passed to the jury.)

Q. (By Mr. Ackerson): Now you were introduced to Mr. McAdow and you handed Mr. McAdow a copy of this Exhibit 1, Plaintiffs' Exhibit 1, did you?

A. Yes. I don't remember if I handed it to him or Mr. Lysfjord.

Q. Then what happened?

A. Well, we were taken by them back to Ragland's desk, and we were sitting there for a few minutes and then they wanted to introduce us to their superior, and one of them took us in to Mr. Harkins' office. [48]

Q. And do you recall which one of them took you in there? A. I don't at the moment.

Q. Would you say it was either Ragland, Baymiller or Thompson?

A. Yes, I would say it was either Ragland or Baymiller.

Q. After you and Mr. Lysfjord got in before Mr. Harkins, will you tell us what was stated?

A. Well, the person that took us in, he didn't stay; he went out. And Mr. Harkins congratulated

(Testimony of Walter R. Waldron.)

us on the joining of his firm and expressed his feeling towards future association and said they would pledge every cooperation their firm could offer in advertising and samples and architectural contacts.

And he also mentioned a job that we might go and look at, that they had the roofing contract on it.

Q. Do you recall what that job was?

A. It was an aircraft company. I don't remember the name, but it was out between Los Angeles and Pomona.

Q. Well, is that all that transpired there then?

A. Yes, so far as I can remember.

Q. All right. What did you do then? You were still with the Downer Company at that time?

A. Yes. [49]

Q. When did you notify the Downer Company you were going to leave?

A. Around December the 15th, that I had planned to leave about the 1st of that next month. And they asked me if I could stay until about the 10th, until they could make some arrangements for replacement, which I did.

Q. Now, in between this last meeting at Flintkote and the time that you left the Downer Company, what, if anything, did you do with respect to setting up your aabeta co.?

A. Well, yes, we arranged for a warehouse on South Atlantic Avenue around the 1st of December.

Q. With whom did you make that arrangement?

A. With a Mr. Spies, the owner.

(Testimony of Walter R. Waldron.)

Q. Was he the owner?

A. Yes. We planned to rent, so we took it. And then later on we decided to keep it for a year and negotitiated a lease.

Q. How long were you in that Atlantic Avenue address prior to the time you signed the lease? Can you give us an idea of that?

A. Yes, about three weeks, I think, or a little better.

Q. Now, I am going to show you this document.

Mr. Ackerson: May I have this marked for identification?

The Clerk: Plaintiffs' Exhibit 2 for identification. [50]

(The document referred to was marked Plaintiffs' Exhibit 2 for identification.)

Q. (By Mr. Ackerson): Mr. Waldron, I show you Plaintiffs' Exhibit 2 for identification. Is this the lease that you executed with Mr. Spies?

A. Yes, I believe that is the exact one.

Mr. Ackerson: I offer it in evidence.

Mr. Black: No objection.

The Court: Received into evidence.

(The document heretofore marked Plaintiffs' Exhibit 2 was received in evidence.)

The Court: Now, counsel, it is the policy of the court when any document is received into evidence it may be immediately passed to the jury; you may

(Testimony of Walter R. Waldron.)

read it to the jury or read part of it to the jury at any time.

Mr. Ackerson: Thank you, your Honor.

The Court: This one is apparently being passed to the jury now.

Q. (By Mr. Ackerson): Mr. Waldron, calling your attention to Exhibit 2, Plaintiffs' Exhibit 2, can you state from looking at that document when it was actually executed, the date upon which it was executed? A. I see a date December 15, 1951.

Q. Can you state that that is the date or the approximate date when you did sign it and execute it? [51] A. I believe it was.

Q. Now, at that time had you made any arrangements in San Bernardino?

A. Not at that time. It was later on, about the first of the year.

Q. Tell us just what you did in that connection.

A. In San Bernardino?

Q. Yes.

A. Since we were short of space here and we were going to open San Bernardino, anyway, I made arrangements out there to use a space, of which I made a lease on about the first of the year.

Q. All right. I am going to show you what purports to be a copy of that lease, Mr. Waldron.

Mr. Ackerson: May I have this marked, your Honor please?

The Clerk: Plaintiffs' Exhibit 3 for identification.

(Testimony of Walter R. Waldron.)

(The document referred to was marked Plaintiffs' Exhibit 3 for identification.)

Q. (By Mr. Ackerson): Mr. Waldron, I show you Plaintiffs' Exhibit 3 for identification, and ask you if that is your signature on there.

A. Yes, that is my signature.

Q. Can you state whether or not that is Rose Vacco's signature?

A. Yes, that is correct. [52]

Q. In other words, you signed that together?

A. Yes, in their place of business.

Mr. Ackerson: I will offer this in evidence.

Mr. Black: No objection.

The Court: Received.

(The document heretofore marked Plaintiffs' Exhibit 3 was received in evidence.)

Q. (By Mr. Ackerson): This lease shows a date of January 2, 1952, between Rose Vacco and Walter R. Waldron for aabeta co.

Now, Mr. Waldron, how soon did you occupy that building in San Bernardino? Were you in it at the time you signed the lease?

A. No; no, we weren't. We had alterations to do. There was no office or anything in it. So later on in the year—or that month we started alterations, to shape up an office, and we received material there sometime in January.

Q. Well now, how long had you been in the

(Testimony of Walter R. Waldron.)

building at the time you received your first carload shipment of Flintkote acoustical tile?

A. I think only a few days.

Q. Now, what, if anything, did you do after this meeting you mentioned with Flintkote, the latter one, in the latter part of November, other than these leases? What did you do in Los Angeles here to get the business going? [53]

A. We had a stationery made up, cards, announcements. We sent out announcements that year of the new business, and personal contacts.

Mr. Ackerson: May I have this marked.

The Clerk: Plaintiffs' Exhibit 4 for identification.

(The document referred to was marked Plaintiffs' Exhibit 4 for identification.)

Q. (By Mr. Ackerson): Mr. Waldron, I am showing you Plaintiffs' Exhibit 4 for identification, and I direct your attention to a card containing some longhand writing, which I want you to ignore, on the card, and a larger green sheet of stationery, and I ask you merely whether or not that is the stationery which you ordered.

A. Yes, that is the stationery and this is the business cards (indicating).

Mr. Ackerson: Yes. This has to do with another matter, your Honor. I am not going to offer it at this time.

The Court: Has it been marked?

(Testimony of Walter R. Waldron.)

Mr. Ackerson: It has been marked for identification, yes.

The Court: This is a good place to take our noon recess?

Mr. Ackerson: Yes, as well as any.

The Court: We will stand in recess until 2:00 o'clock.

(Whereupon, at 12:00 o'clock noon, a recess was taken until 2:00 o'clock p.m. of the same day.) [54]

May 5, 1955—2:00 o'Clock P.M.

Mr. Ackerson: Will you resume the stand, Mr. Waldron?

WALTER R. WALDRON

the witness on the stand at the time of recess, resumed the stand and testified further as follows:

Direct Examination
(Continued)

By Mr. Ackerson:

Q. Mr. Waldron, prior to the noon recess we were discussing your activity, some of your activity here and in San Bernardino. That is, you were trying to set up a better company for operation.

Do you recall whether or not your telephone was established in Los Angeles or in San Bernardino first? A. The Los Angeles area.

Q. And you have testified that your warehouse was established here prior to San Bernardino, is

(Testimony of Walter R. Waldron.)

that right? A. That is right.

Q. After you moved into this small warehouse, did you make any efforts to get additional warehousing space in Los Angeles?

A. Yes. Anticipating our activities here and volume we tried about three or four blocks from the address we had at that time, a large sheet metal warehouse that was grouped among some manufacturer's warehouses, and that was one building they [55] didn't use.

However, they had a large fence around the entire project there and they had to close it at about 5:00 o'clock and have a watchman on, so that wouldn't work very well in our activities since oftentimes we worked late.

So we finally did get one over near the Los Angeles River, which was about a half mile or so from our warehouse.

Q. When did you get that second warehouse in Los Angeles with respect to, say, December 1st?

A. I am not sure, but sometime in January or early February.

Q. How long did you keep that latter warehouse?

A. I think about two or three months, or four months, something like that.

Q. Now, Mr. Waldron, as an acoustical salesman, I stated in the opening statement that a carload of tile was about 60,000 square feet. Can you give me some idea as to just how large an order that is, I mean, what does an average size job consume in acoustical tile?

(Testimony of Walter R. Waldron.)

A. Well, first a careload of material is based on units, one-half inch units of thickness, although you may buy one-half inch thick material that would require about 60,000 square feet to fill a car, and if you bought larger thicknesses why the multiple thereof would determine 60,000 units of one-half inch units. [56]

So you wouldn't necessarily have 60,000 square feet of tile in one car, but you would have 60,000 units.

Q. Well, let us assume that it was—do you recall what type of units or what type of thickness you ordered in your first order of tile from Flintkote?

A. Yes, the first order, not having any particular place to put it on jobs, it was about 90 per cent or better of one-half inch units and a small amount of three-quarter inch units.

Q. Now in your operations with the Downer Company prior to that time how long would you expect that amount of tile to last in order to fill the orders that you were taking for Downer & Company? Would it fill one order, two orders, would it suffice for a month of operation, or what?

A. It could fill one order or it could fill probably a half a dozen orders, depending on the size. But there are jobs that take that amount and even greater on one job. [57]

Q. Now, Mr. Waldron, I have previously called your attention to Exhibit 1 in evidence, Plaintiffs' Exhibit 1 in evidence, and I call your attention to

(Testimony of Walter R. Waldron.)

the fact that this may be an exact copy or it may be the copy you submitted to Flintkote Company.

You notice that the address of aabeta co. on this financial statement, which you submitted to Mr. McAdow, I believe, bears an address aabeta co., Los Angeles, California.

A. That is right. If this isn't the exact copy, it is an exact facsimile of the copy.

Q. In other words, if this is not the identical financial statement submitted to Flintkote it is an exact copy? A. That is right.

Q. Now, do you have any idea in your own mind, Mr. Waldron, as to when the telephone was connected in Los Angeles?

A. Yes, right around the first week in January.

Mr. Ackerson: Mr. Black, I have a few bills here from the Telephone Company. Do you think we could stipulate it was within the first week?

Mr. Black: That is my understanding of the facts.

Mr. Ackerson: I won't bother to introduce these. It shows before the 10th, all of these bills. I think it was probably three or four days before that.

Mr. Black: Of 1952? [58]

Mr. Ackerson: Of 1952. So if we can stipulate to that I won't bother to clutter the record with additional exhibits on that point.

Mr. Black: It is my understanding that is the record of the Telephone Company, Mr. Ackerson. After the 4th of January.

(Testimony of Walter R. Waldron.)

Mr. Ackerson: When it was installed.

Mr. Black: Yes.

Mr. Ackerson: Thank you.

Q. (By Mr. Ackerson): Mr. Waldron, did you, in setting up aabeta co., publish a fictitious name, the aabeta co., as a fictitious name company?

A. Yes, I did.

Q. What did you do in that respect?

A. We went to a local legal paper they call it, that handles that advertising and made application, and gave them the data they wanted, and went before a notary public to have it signed or whatever notary publics are supposed to do.

And then they in turn published it for about 30 days or 60 days. I forget; it is quite some long time.

Q. And do you recall, Mr. Waldron, whether that was—did you also publish a fictitious name——

A. Oh, yes.

Q. ——in San Bernardino?

A. I am sorry. Yes, we did. [59]

Q. Do you recall which publication was first or which application was made first?

A. As near as I can remember, the Los Angeles one was first.

Mr. Ackerson: May I have this marked for identification as Plaintiffs' next in order.

The Clerk: Plaintiffs' 5 for identification.

(The document referred to was marked Plaintiffs' Exhibit 5 for identification.)

(Testimony of Walter R. Waldron.)

Mr. Black: Which is No. 5?

Mr. Ackerson: That is the Certificate. And this as Plaintiffs' for identification next in order, which relates to the Los Angeles publication.

The Clerk: Plaintiffs' 6 for identification.

(The document referred to was marked Plaintiffs' Exhibit 6 for identification.)

Mr. Ackerson: The next exhibit for identification relates to the San Bernardino publication.

The Clerk: Plaintiffs' 7 for identification.

(The document referred to was marked Plaintiffs' Exhibit 7 for identification.)

Q. (By Mr. Ackerson): Mr. Waldron, I show you Plaintiff's Exhibit 5 for identification and ask you if that is the certificate of business for a fictitious firm name that you received as a result of your activities at the Los Angeles address? [60]

A. Yes, that is the one.

Q. Do you observe the date of that?

A. 11th day of January, '52.

Mr. Ackerson: Thank you. I will offer that in evidence as Plaintiffs' Exhibit 5 in evidence.

The Court: Received.

(The document heretofore marked Plaintiffs' Exhibit 5 was received in evidence.)

Q. (By Mr. Ackerson): Mr. Waldron, I show you Plaintiffs' Exhibit 6 for identification, and ask you if you received that as a result of your

(Testimony of Walter R. Waldron.)

efforts in publishing a fictitious name in the Los Angeles area.

A. We published two—yes, this is the one; Los Angeles, yes.

Q. And this purports to be the affidavit of the publisher to the effect that it had been published?

A. That is right.

Q. Do you note, Mr. Waldron, that the publication dates were January 17, 24, and 31, and February 7th of '52?

A. Yes. Those are the dates they had it running in their paper.

Q. Yes. Of course, prior to that time you made the application and the arrangements, did you not?

A. Yes. [61]

Q. Now, I show you a similar document marked Plaintiffs' Exhibit for identification No. 6, and ask you if that is the same type of document which you received as a result of your application for publication of aabeta co. in San Bernardino County? A. Yes, I received that.

Q. And you note that the publishing dates are January 16, 23, 30, and February 6th?

A. Yes.

Mr. Ackerson: I will offer Plaintiffs' Exhibit 6 for identification in evidence.

The Court: Received.

(The document heretofore marked Plaintiffs' Exhibit 6 was received in evidence.)

(Testimony of Walter R. Waldron.)

Mr. Ackerson: And Plaintiffs' Exhibit 7 for identification in evidence.

The Court: Received.

(The document heretofore marked Plaintiffs' Exhibit 7 was received in evidence.) [62]

Q. (By Mr. Ackerson): Now, Mr. Waldron, do you remember receiving an invoice for the cost of your printing of your original stationery for the aabeta company?

A. Yes, we received such an invoice.

Q. Do you remember about when you received that invoice?

A. No. As far as dates, I think it is probably the latter part of January.

Q. Did you ever make a separate or any additional purchase for stationery or calling cards in connection with your San Bernardino operations?

A. No. They were all one and they in turn had both addresses on them and our telephone numbers.

Mr. Black: That is objected to as not the best evidence.

Mr. Ackerson: I have had him identify that stationery in Plaintiffs' Exhibit 4 for identification.

Mr. Black: I wasn't sure that he was talking about that.

Mr. Ackerson: Let me ask him.

The Court: He has not stated the purported contents of names, and so forth, so I do not think that we have got into a situation which needs correction as yet.

Mr. Ackerson: I don't understand it. But I

(Testimony of Walter R. Waldron.)

did have [63] Mr. Waldron identify this stationery and calling card in Exhibit 4 for identification.

Q. Is that the original stationery that you ordered at that time, Mr. Waldron?

A. That is right.

Q. And that is the first order for stationery, is it not? A. That is right.

Q. And that is the order that you were billed for in these early days? A. That is right.

Q. What was the name of the printing company, do you recall?

A. Yes. I think it is the Best, B-e-s-t, Printing Company here in Los Angeles.

Q. Now, Mr. Waldron, when did you first commence trying to lay the foundation in San Bernardino? Was that before or after your work here in Los Angeles?

A. It was after my work here. The only thing I did in San Bernardino was the mechanics, locating quarters, arranging for telephone and banking outlet there.

Q. When did you first start arranging for quarters or trying to arrange for quarters in San Bernardino? Was it before or after you had moved in your Atlantic address here? [64]

A. That was after, about 30 days after we moved in at Los Angeles.

Q. And what else did you do in San Bernardino? Did you do work prior to the time you found quarters in San Bernardino or was that the first thing you did?

(Testimony of Walter R. Waldron.)

A. No, the first thing we did was to find quarters, which we finally did, and arranged for a little before the first of the year or right at the first of the year.

Q. It was on or about the date of the lease in San Bernardino?

A. Yes. I negotiated that a few days before.

Q. Now did you contact contractors or put in a telephone or anything like that in San Bernardino prior to the date of that lease?

A. No, sir, we didn't do anything, or I didn't do anything in San Bernardino, and I was the one that did the work out there until after we got our telephone in, which was somewhere in about the middle of January, I believe.

Q. Now had you done anything in Los Angeles with regard to obtaining contracts or bidding on jobs in Los Angeles prior to your activities in San Bernardino? A. Yes.

Q. Where did you start in bidding first?

A. Almost immediately. Since we know that it takes at least from three to five or even as much as eight months from [65] the time you bid on a set of plans or blueprints until the job is ready for acoustical tile, which is along the latter part of the construction work, why we were immediately working and bidding. As soon as we got out take-off sheets made up and the preliminary work before that on a scratch pad, of which I have one over there, which I remember that I did some work on

(Testimony of Walter R. Waldron.)

before we had our regular estimating sheets made up.

Q. Well, then, I take it your answer is that you were bidding here in Los Angeles prior to the time you did any work over in San Bernardino?

A. Oh, yes.

Q. Do you recall, Mr. Waldron, any of these very first jobs you did either here or in San Bernardino?

A. Yes. We did one that was sent to us by Bob Ragland of the Pioneer-Flintkote people.

Q. Where was that located?

A. That was here in town—I can only think of Santee Street—that may not be right, but it was the Owens Roofing people.

Q. Now I am going to call your attention to Plaintiffs' Exhibit 4 for identification again and ask you if that has any identification or relation to this Owens Roofing job you did?

A. Well, this is the original contract, or a copy of the original contract. There is always two made. This is [66] the carbon under the original.

Q. And is the original given to the purchaser?

A. Yes, we leave that with the buyer, and this is a copy of it, and a copy of his signature. That was a job on Mateo Street.

Q. Is that the Owens Roofing job you are talking about? A. Yes, that is correct.

Q. Now you are referring to the green sheet in this exhibit, is that right?

A. That is right. [67]

(Testimony of Walter R. Waldron.)

Q. And that is the same sheet as you identified as your original printing order?

A. That is correct.

Q. Is it not? A. That is right.

Q. And this is the carbon of your own signature appearing there? A. That is right, yes.

Q. This is a carbon of R. James McLane?

A. That is correct.

Q. Now, you note that is dated January 3, 1952?

A. That is right.

Q. Now, Mr. Waldron, are the rest of these documents in this exhibit also related to that job?

A. Yes, this white copy is the job, the sheets that are sent to the job with the persons that are installing it, as an instruction sheet (indicating).

Q. In other words, when you make the first sheet—— A. Yes.

Q. ——you give that to your installers, or what was the word you used this morning?

A. Applicators.

Q. Applicators.

A. In this case that was me; I did the job.

Mr. Ackerson: I am going to offer this at this time. [68]

Mr. Black: May I see those documents first, Mr. Ackerson?

Mr. Ackerson: Yes, I thought you had seen them.

Mr. Black: I want to identify what the witness actually was looking at at that time.

Mr. Ackerson: I think the record should show

(Testimony of Walter R. Waldron.)

where I used the words "January 3, 1952," it should be "January 31, 1952," your Honor. The "1" being very faint. My eyes aren't as good as Mr. Black's.

Mr. Black: The date didn't seem to jibe there. There is no objection.

The Court: Received.

(The document heretofore marked Plaintiffs' Exhibit 4 was received in evidence.)

Q. (By Mr. Ackerson): Mr. Waldron, will you state, just as a matter of fact, as nearly as you can just the mechanical way in which this job came to you, how you learned about the job?

A. Well, Bob—I refer to Bob, Mr. Ragland. We had been long-time friends, since 1946 or '45. I hope you will excuse the informal term. Bob let us know about the job and told us that he would talk to the people, since they had no way of knowing we were part of the acoustical industry. We weren't in the book.

So he asked us to find out about it. So I went over there and talked to him. [69]

Q. You talked to Mr. Ragland?

A. Mr. McLane.

Q. McLane?

A. McClure—I am not sure of that name.

Q. McLane.

A. Yes. They wanted this work done and we handled Flintkote material, and they in turn worked very closely with Pioneer-Flintkote and

(Testimony of Walter R. Waldron.)

roofing materials, so they felt that was real good. And they let us go ahead and do the job.

Q. Did they require you to bid on the job?

A. No, there wasn't a competitive figure there at all. We were the only people——

Q. Whom did you talk to over there, Mr. McLane? A. Yes, Mr. Jim McLane.

Q. Do you know what position he occupies in Owens Roofing? A. He is the president.

Q. I believe you stated you installed this job yourself. A. Yes, I and one other person.

Q. Who was the other person?

A. William Yeomans.

Q. Do you recall having any conversation with Mr. McLane? A. Yes. [70]

Q. At the time you installed the job?

A. Oh, yes. He was there watching us do the work.

Q. Will you relate the circumstances and the conversation with Mr. McLane?

Mr. Black: That is objected to, if the court please. I can't see how that can be relevant or material. It is not binding on The Flintkote Company. I don't know the purpose of it.

Mr. Ackerson: I would like to have Mr. Black reserve a motion to strike, if it isn't connected up with The Flintkote Company.

Mr. Black: Very well.

The Court: In the present posture of the case it would be legally objectionable, unless you are willing to go along with Mr. Ackerson's suggestion.

(Testimony of Walter R. Waldron.)

Mr. Black: If counsel would be good enough to explain the purpose of the offer——

Mr. Ackerson: Well, I will ask the court and jury both to excuse me. I will tell Mr. Black, because if I am wrong I don't want it to go before the jury.

The Court: All right. You just go over and tell him. It might be a proper legal ground, but it isn't apparent on the present record.

Mr. Ackerson: There is no objection to that extent?

Mr. Black: No. [71]

Mr. Ackerson: If there is anything else, Mr. Black, you may have it stricken.

Mr. Black: Very well.

Q. (By Mr. Ackerson): Would you state the circumstances of this installation and any conversation you had with Mr. McLane at the time you installed it?

A. Yes. I asked him how he found out about us, and he said he called, or, Bob dropped in or one of the salesmen dropped in, and they were discussing the need and they learned that the Flintkote people were—learned or knew that the Flintkote people had acoustical tile and so they decided they would use it. And they wanted to know who would do the job for them.

So they were—we were recommended to them, or vice versa. I don't know, but it was in that conversation with Jim McLane—by the way, he is the

(Testimony of Walter R. Waldron.)

son of—I think the father was there, too, at the time.

Q. You are relating a conversation with Jim McLane and son? A. Yes; Junior, I believe.

Q. There are two McLeans in Owens Roofing?

A. I didn't know the father's name.

Q. Did Jim McLane—or is that all the conversation you had with Jim McLane?

A. The only thing I can think of that would bring him [72] to us, that they asked him, or Bob asked him to allow us to figure the job for him.

Q. You stated you had no competition on that job? A. So I was told by Mr. McLane.

Mr. Ackerson: I would like to call the jury's attention to the facts in connection with Exhibit 4. I do offer it, if I haven't.

The Clerk: It was received. [73]

Mr. Ackerson: So I want to call your attention to the fact that this original stationery of the aabeta company does contain the address of both Los Angeles and San Bernardino.

Q. Now, Mr. Waldron, this Owens Roofing Company job was one of the first ones you actually installed in this area, wasn't it?

A. I believe it was. We were getting rather active right along in that time, and I don't know for sure but I think it was.

Q. Where did you get the tile? Did that come from this first order of Flintkote tile, or did it come from some other source?

(Testimony of Walter R. Waldron.)

A. No, that came from the first order that Pioneer-Flintkote shipped us.

Q. That brings up the purchasing of this first order of Flintkote tile. Will you state from memory how that order came about?

A. How we put the order in?

Q. Yes. How did you happen to place your first order for Flintkote tile?

A. Well, Mr. Ragland informed us early in December of '51 that there would be a shutdown of the manufacturing plant right around the first of the year, and they didn't how long it would stay shut down for changeover of machinery [74] of some kind, and he urged us to buy at least one car of tile so that we would have materials on hand for anything that might come up that that particular size of material would do for in the event there was a long shutdown.

Q. How did Mr. Ragland notify you or make that statement, by telephone or what?

A. Yes, he called my partner, Elmer, and they arranged for us to—Elmer called me to come down to the shop, and Bob came by and we went—either then or prior to that moment Elmer had purchased a little purchase order book at a neighborhood stationery store—and we left from there and went to a Colonial Club restaurant for lunch. It was pointed out to us by Bob that we had to have some kind of something as an order, he just couldn't take any order as a purchase order.

Q. Referring to Mr. Ragland now?

(Testimony of Walter R. Waldron.)

A. Yes. And after purchasing this little purchase order book in a stationery store, the three of us went over to this cafe and Bob wrote up this thing, and I signed it. And they have numbers on it in sequence, I believe.

Q. Who was there, yourself, Mr. Ragland and who else? A. Mr. Lysfjord.

Q. Just the three of you? A. Yes.

Q. Did you actually meet at your Atlantic Avenue address [75] prior to going to this restaurant? Is that what you stated?

A. Yes, that is right.

Q. Mr. Waldron, how many times, if any, had Mr. Ragland been to this Atlantic address prior to this meeting?

A. You mean to make the purchase?

Q. Prior to the time you had this purchase order meeting.

A. I don't know but that particular time must have been right around the 10th of the month of December, but I can't remember whether he was there earlier right now. But he was there many times immediately afterwards.

Q. Now when you signed this purchase order then Mr. Ragland took it with him, I guess?

A. That is right.

Q. To Flintkote? A. Yes.

Q. You don't recall the number that happened to be on that purchase order, do you?

A. No, I don't recall it at the moment.

(Exhibiting document to counsel.)

(Testimony of Walter R. Waldron.)

Mr. Ackerson: May I have this marked for identification as the next exhibit in order?

The Clerk: Plaintiffs' Exhibit 8 for identification. [76]

(The document referred to was marked Plaintiffs' Exhibit No. 8 for identification.)

Q. (By Mr. Ackerson): Mr. Waldron, did you subsequently receive an invoice from the Flintkote Company for that first order of tile?

A. Yes, we did.

Q. I am going to show you Plaintiffs' Exhibit 8 for identification and ask you if that happens to be the document or a copy of it.

A. I am sure that this is a copy of it, and apparently our order number is on there direct from that early purchase order book.

Q. And that order number is shown to be what?

A. 2351, and that is under "your order number," meaning us.

Q. And do you see another order number there, any other number?

A. And our order number, meaning Flintkote, is C-35951.

Mr. Ackerson: I will offer this in evidence at this time.

Mr. Black: No objection.

The Court: Received.

(The document heretofore marked Plaintiffs' Exhibit No. 8 for identification was received in evidence.) [77]

(Testimony of Walter R. Waldron.)

Mr. Ackerson: I will pass it to the jury. There is no obligation, ladies and gentlemen, for you to look at everything on there, but I wanted to give you a chance.

The Court: You might scan these exhibits anyway just so you will kind of index them in your mind. During the period of your deliberations in the jury room you will have at the close of the case all exhibits and you may have them for all the time that you will need.

Q. (By Mr. Ackerson): Mr. Waldron, on this —let us call it the purchase order meeting—was there any discussion as to shipping address or anything of that sort?

A. Yes, we were—or, rather, I had understood that by carload lots it would be necessary to take it and put it in one place, otherwise there would be an extra charge for split carlots.

So the Atlantic address would not hold a carload of material, with our scaffolding and equipment and office space that we had there, and I didn't have a San Bernardino place other than the fact that I am associated with the California Decorating Company that has a large yard in addition to their buildings, and my plan at the moment for lack of a better place to put it, I gave the address of the California Decorating Company. I knew that if I didn't have a place by that time that I could store it there. [78]

Q. And do you recall the address of the California Decorating Company?

(Testimony of Walter R. Waldron.)

A. Yes. That is 1085 Pacific Avenue, San Bernardino.

Mr. Ackerson: Now I would like to call the jury's attention to the exhibit which you are looking at and the date of that exhibit is on there. I believe you will find that it is December 11th, that is the purchase order date on that exhibit. If I am wrong you will note it, but I would rather do it that way than to stop and read it now.

Q. Were there any change of orders on the shipping instructions that you were responsible for or was the merchandise delivered to that address?

Mr. Black: May I interrupt at this time, counsel? I think just to clarify this invoice, it should be stated that there is a typographical error which might otherwise confuse the jury. The figure "5700" I think everybody agrees should read "57,000."

Mr. Ackerson: That is true.

Mr. Black: And I invite a stipulation that that is an order for 57,000. The invoice shows 5700.

Mr. Ackerson: Yes, it does in one spot and in the other spot it is—no, I think you are right.

The Court: What is the exhibit number?

Mr. Ackerson: That is true. It is 57,000 one-half inch tile and the rest of it is the different [79] size.

Mr. Black: It makes up a total, as you can see, of 59,000 square feet on that figuring, instead of apparently 7700 which of course is otherwise misleading.

(Testimony of Walter R. Waldron.)

The Court: To which exhibit are you referring?

Mr. Ackerson: I am referring to the last exhibit, Plaintiffs' Exhibit No. 8.

Mr. Black: I didn't mean to interrupt you, counsel, but I am afraid it would be misleading to everybody.

Mr. Ackerson: I appreciate that because it has come up once before when you weren't here, Mr. Black.

Q. Now you have mentioned a number of meetings, or two or three meetings that you have had with the Flintkote people. Let's take the date, the beginning date of December 11th, the date of this order. Did you see Mr. Ragland—do you recall seeing Mr. Ragland subsequent to this December 11th day? A. Oh, yes. [80]

Q. Where did you see him?

A. The dates I don't remember, but he would frequently drop by our office here in L.A. before—it would be as early as 8:00 o'clock in the morning. He would mention he would stop by before going to his office.

Q. Is his office somewhere in the vicinity?

A. Yes, it isn't so great a distance, five minutes by car, I suppose.

Q. How often would you say that occurred between December 11, 1951, and February 15, 1952?

A. I would say a couple of dozen or more.

Q. In other words, he was quite a frequent visitor there, is that right?

(Testimony of Walter R. Waldron.)

A. Oh, yes. He made every effort in the world to help us get going.

Q. Do you recall a prospective job called the Lido job? A. Yes, I do.

Q. What was the Lido?

A. The Lido, it is a sort of an apartment hotel in Hollywood, and on the first floor they have a restaurant area. And they were remodeling, and he stopped by the house and left word for me to go and take a look at it for any possible work that we could do in there.

Q. By "the house" what do you mean?

A. I am sorry. My home. [81]

Q. Your own home?

A. Yes. It is right near that job.

Q. Mr. Ragland went by your house frequently?

A. Yes. That is en route to his home in the San Fernando Valley area.

Q. You state that Mr. Ragland called your attention to the Lido job at your home then?

A. Yes, that is true.

Q. Was that prior to, say, February 15th of '52?

A. Yes, it was some little time. I can't remember just when.

Q. Do you recall receiving notice of any other job in this area from Flintkote?

A. Yes, we received by mail from the Flintkote people a request that the public job, that is, the school job, UCLA, I believe—they in turn sent to them a request, requesting a bid of installation,

(Testimony of Walter R. Waldron.)

which they don't do. They in turn forwarded it to us at the Bell address.

Mr. Ackerson: May I have this marked Plaintiffs' Exhibit for identification next in order?

The Clerk: Plaintiffs' 9 for identification.

(The document referred to was marked Plaintiffs' Exhibit 9 for identification.)

Q. (By Mr. Ackerson): Mr. Waldron, in connection with your last answer, can you identify this exhibit, Plaintiffs' [82] 9 for identification, as this notice that was received at your Bell address from the Flintkote Company?

A. Yes, that is correct.

Mr. Ackerson: I will offer that in evidence at this time.

The Court: Received.

(The document heretofore marked Plaintiffs' Exhibit 9 was received in evidence.)

Q. (By Mr. Ackerson): Do you recall whether or not that job related to work in San Bernardino?

A. What job, sir?

Q. The California University job, Exhibit 9 in evidence.

A. No, that would be in the Westwood area.

Mr. Black: I will object to that. The document speaks for itself.

Mr. Ackerson: You are correct, Mr. Black; I am sorry.

Q. (By Mr. Ackerson): Can you look at this and state? Santa Barbara (indicating).

(Testimony of Walter R. Waldron.)

A. Where do you see the "Santa Barbara"?

Oh, yes. That was the one for Santa Barbara, Santa Barbara College.

Mr. Ackerson: I stand corrected, Mr. Black; I knew that and I thought the witness knew it, too.

Q. (By Mr. Ackerson): Did Mr. Ragland [83] during this period prior to February 15, 1952, ever call your attention or refer your attention to other contractors or prospective jobs in the Los Angeles area or elsewhere?

A. Yes, Mr. Ragland gave us a copy that they evidently had made up for just reference, and names and addresses of people that acoustical contractors work with.

I don't know who had it made up, but he gave it to me, and in turn marked off certain people that he was acquainted with and it covered the Los Angeles architects and engineers and various contractors.

It also covered San Bernardino and East L.A., Palm Springs, and various places out there. Since he had worked out there many years he made note on there, checked off the ones he was best acquainted with and thought we should call on those at our earliest convenience.

Q. You had never operated in the San Bernardino area or outside the Los Angeles area, had you, as a salesman? A. No.

Q. You were not acquainted out there at all at that time?

A. No, not for general contractors. Any work

(Testimony of Walter R. Waldron.)

we did was through local contractors in the past, that would have a job out in that area, and then in turn I would go out and take care of the job or take a look at it.

Q. Do you have those papers you are referring to in [84] the courtroom today?

A. Yes, they are with that black book (indicating).

Q. I show you a sheaf of papers here and ask you if you can identify those as the papers or part of them?

A. Yes. Mr. Ragland wrote here a name of a company, Dowd-Hoffer Company, contractor in Fontana. Then in turn he marked off others in Claremont and Ontario and Palm Desert, and wherever he knew contractors that he worked with as a salesman with the Shugart Company.

Q. Are you referring to all these papers that I am showing you?

A. The others here are the Los Angeles area, Beverly Hills vicinity, Wilshire district. This, of course, is more voluminous because there are so many more here. That is the Wilshire district and east of Vermont and the South Los Angeles area, Silver Lake district, Valley west of Laurel Canyon, Studio City, Van Nuys, Burbank, North Hollywood, and, of course, we were acquainted here just about as well or even better than Bob, so he didn't make any notes on that. This was all stapled together at one time, as you will notice, and it has come apart now.

(Testimony of Walter R. Waldron.)

Mr. Ackerson: I would like to have these sheets stapled back together and marked Plaintiffs' Exhibit next in order for identification.

The Clerk: Plaintiffs' 10 for identification. [85]

Mr. Ackerson: Your Honor, I realize I am violating the rule of the court here by bringing out certain exhibits that Mr. Black hasn't seen.

I think your Honor should know he has seen everything except a very few exhibits. This won't go on.

The Court: Well, if you feel there is something detrimental to you, Mr. Black——

Mr. Black: This one I haven't seen.

The Court: ——you can take a recess.

Mr. Ackerson: I think that would be in order, your Honor. This is rather a lengthy matter.

The Court: You are suggesting a recess?

Mr. Ackerson: Yes.

The Court: All right. We will recess until 3:20.

(The document referred to was marked Plaintiffs' Exhibit 10 for identification.)

(Short recess taken.) [86]

Q. (By Mr. Ackerson): Mr. Waldron, I am calling your attention to Plaintiffs' Exhibit 10 for identification, and to the first page of that memorandum. Can you identify from personal knowledge whose writing in pencil appears on that page?

A. Yes, this construction company name here was written by Mr. Ragland in my presence.

Q. And what about these check marks?

(Testimony of Walter R. Waldron.)

A. These were his also. He checked them all. And this particular one he made a couple of checks on because he was a little better acquainted there. That is why the two were there.

Q. And you are referring to the name Anderson Benjamin Hall, 265 South Garvey Avenue, at the top of page 1? A. That is right.

Q. Now does that testimony as to these markings apply to any other markings on the document?

A. Well, in the Los Angeles area here in South Gate and Whittier he has one marked there, someone he was pretty well acquainted with, the other people he worked with under him.

Q. But whatever pencil marks appear on these documents are Mr. Ragland's marks?

A. That is right.

Q. Now how did you come by this [87] document? A. He gave it to me.

Q. Where did he give it to you?

A. In my residence sometime early or late in November of '51.

Q. Was it before or after you had received your authorization to have Flintkote tile?

A. It was afterwards.

Mr. Ackerson: I will offer this in evidence at this time, if there is no objection, Mr. Black.

Mr. Black: No objection.

The Court: Received.

(The document referred to was received in evidence and marked Plaintiffs' Exhibit No. 10.)

(Testimony of Walter R. Waldron.)

Q. (By Mr. Ackerson): Now, Mr. Waldron, prior to the time you were notified that you could no longer buy Flintkote tile, had you done any job in San Bernardino? A. No.

Q. Had you done any job outside of the Los Angeles area?

A. Not to my knowledge at the moment. I don't believe so.

Q. Did you ever do a job in San Bernardino?

A. Oh, yes.

Q. That would be subsequent to the time [88] that your supply was terminated, is that correct?

A. That is correct.

Q. Now do you have in mind, Mr. Waldron, the manner in which you were informed that you could no longer buy Flintkote tile?

A. Oh, yes.

Q. Can you tell us the mechanical steps of how that came about?

A. Yes. My first knowledge of this was when I got a phone call in San Bernardino from my associate Lysfjord, and I phoned back—we had an answering service out there—I picked up this message and I phoned back and he said I should be in the Los Angeles office around 2:30 or 3:00 o'clock. So I immediately pulled out. He said it was considered important.

Then when I arrived there was Mr. Ragland, Mr. Baymiller and Mr. Thompson present with Mr. Lysfjord.

Q. And that was in the Los Angeles office?

(Testimony of Walter R. Waldron.)

A. Yes.

Q. Do you have any way of telling us the date of that meeting?

A. Well, I have it placed rather close in some notes I have that I keep virtually daily.

Mr. Ackerson: I will ask Mr. Black to follow this because I don't intend to use it for anything other than [89] refreshing the witness' memory.

Q. I am handing you some yellow sheets and a day book.

A. Well, these yellow sheets come up from the year of '51. I used this and the balance of them are over there. This is some stuff I had during the months of January and February, and I find, although I don't have dates on these, the way I worked with this sort of pad was that the blank sheet under my work on this sheet was the next day's work to be done.

And I find on this sheet a note of an address, and we had insured with a firm of this name here, Starr and Kraft, and along about February he decided—I don't know why he shouldn't give them to us earlier, but he finally came around and gave us one of these day books for advertising, perhaps he just had them made up, I didn't ask him—but anyway on February 1st that is when I started making notes in here. And I have various items, numerous here, things I did and it is almost day by day.

So I have here a sheet of February 19th. I was in San Bernardino on the afternoon of February 18th,

(Testimony of Walter R. Waldron.)

and I stayed overnight, and on the 19th I got the call, and the reason I believe this is it is that I had called "E" here—that is my associate, Elmer—and I made that call and then that ties in, this sheet will tie in, this particular piece of work here, Pacific Coast Terminal Warehouse, Mr. Druary, who [90] was evidently the maintenance manager. I was working with him to do a job here—let me turn the sheet here—here I find it. I was checking the job here, and I see out here I had "We are hi"—and I used the word "hi" for an abbreviation—"We are hi."

Before that I was over here sometime in that month, and it calls for three-quarter 12x12 acoustical tile, and I have a note here, "May not have enough in time, Bob will try to borrow." That is an occupied area and is already existing and therefore there wouldn't be any building delay. That is why that is there. [91]

Q. Who is Bob?

A. Bob is Bob Ragland. Now, this Burback here is the owner of the telephone service that I used in San Bernardino. And they had a note there, I guess, to call him.

I have other notes on this. I am still trying to get back to here (indicating), so these two tie together. When I quit using this work and started to use this, you see, then I find over here (indicating) I had a dinner engagement at the Arrowhead Springs Hotel on Thursday, February 21st.

Now, I think they opened that hotel expressly

(Testimony of Walter R. Waldron.)

for that association—I don't know. That might have been—one time they did; I was up there.

Anyway, Allied Construction Industries arranged a dinner there and they are an association of general contractors in San Bernardino. Jimmy Williams was the head of it at that time and he asked me to join that association. A lot of sub-contractors joined the general contractors association out there.

So this was preliminary arrangement, and to get acquainted so I might be accepted as an acoustical contractor in the association of the general contractors out there.

Now I remember of telling Jimmy Williams what had happened and I didn't know if I could continue at that time.

Q. What had happened? A. What? [92]

Q. What did you tell Mr. Williams had happened?

A. That our line of supply had been cut off and we didn't know at that moment if we could get any other. So he said, "Well, how did that happen?"

And I just told him, I said, "They just told us we were doing something wrong and they just cut it off."

Then, you see, I have blank pages here (indicating). This was a prearranged setup here. And then I find on Sunday, February 24th, I started looking for acoustical tile. I find I went to Davidson Plywood. I got ½ 12 by 12. That may not mean anything except to me. It is acoustical tile. And Insulite Company, and see Tom Crane—he is the head

(Testimony of Walter R. Waldron.)

of the fiberboard and acoustical tile—regarding acoustical tile plyboard, 3rd and Alameda. I tie down—I believe it is right. Thursday, February 19th they were in our office.

Q. Very well, Mr. Waldron. Now, let's get back to this meeting at your office on or about February 19th.

You have stated you came in from San Bernardino at the request of your partner, Mr. Lysfjord.

A. Yes.

Q. When you arrived there you found the three Flintkote representatives and your partner, Mr. Lysfjord? A. That is right.

Q. All right. Tell us what happened.

A. Well, after shaking hands around Bob [93] mentioned that the news—they have bad news for us and that Mr. Thompson would tell us about it.

Q. By "Bob" again it is understood you mean Mr. Ragland?

A. Yes. I am sorry about that. I have known him so many years I forget to be more formal.

At any rate, Mr. Thompson said that we were not to get any more acoustical tile, and that was his superior's decision, because we were operating in the Los Angeles area.

I asked him about the agreement we had at that luncheon that day, about wherever we work, and they had no restrictions on where we worked, and they didn't even tell us not to work in the Los Angeles area. As a matter of fact, they were most

(Testimony of Walter R. Waldron.)

happy we could continue with the business we had been doing here.

Q. Who said they were most happy? Is that your idea or did somebody say that?

A. At the dinner we had at the Manhattan Supper Club they wanted us to continue with the people.

The Court: "They wanted" is your——

The Witness: I am sorry.

The Court: ——interpretation of what someone said. You tell us what they said and the jury can decide whether they wanted it or whether you just thought they did.

The Witness: Yes. Mr. Thompson wanted [94] us to continue with the people we had been doing business with.

The Court: What did he say?

Q. (By Mr. Ackerson): What did he say? That is what we want, Mr. Waldron, and not your interpretation of what he said. The words he used, as near as you can remember.

A. He wanted us to be, or, asked us if we could continue selling the volume we were selling at that time with the people that we knew here in Los Angeles.

And we assured him we could.

Q. Very well.

A. Am I clear there, by the way?

Q. Yes. That is better. What did Mr. Thompson say when you reminded him of this?

A. He said, "We have nothing to do with it.

(Testimony of Walter R. Waldron.)

That—" I think he used the words "higher-ups." That is what is in my mind at the moment, and I believe I am right. That the higher-ups decided this, and "All we are to do is to carry it out, the order."

Q. What did you tell him, if anything? Did you say anything else?

A. No, other than I didn't think they were keeping their bargain.

Q. Do you recall anything Mr. Lysfjord said?

A. He pointed out the fact that they were backwatering on their former agreement, and that there was nothing ever [95] said about not doing business in any place. It was all agreed, to do business every place and to get going.

Q. That reminds me of another question that I will interrupt you for, Mr. Waldron. Did any Flintkote person ever tell you they restricted the area in which you could operate?

A. No. They assured us they had never had a restriction or restricted area up to that time, at least, and I don't know if they do now.

Q. During your experience as a salesman, did you ever work for an acoustical contractor that was restricted in the area in which he could operate?

Mr. Black: That is objected to as being incompetent, irrelevant and immaterial.

The Court: Overruled.

Q. (By Mr. Ackerson): You may answer.

A. I don't know if I catch you quite right. Will you go through that again?

(Testimony of Walter R. Waldron.)

Q. Did you ever work for an acoustical contractor as a salesman where you were not permitted to take a job wherever you could get it, where there was a restriction of territory in which you could operate?

A. The only restriction we had was through transportation of men and subsistence. Wherever we could get a competitive figure on a job—in Bakersfield or any place else, we would have to send our men from here, which means [96] subsistence, and that, in turn, might throw us out of line with people who might be local; Bakersfield or Fresno, or anywhere else.

That was the only restriction, was economics. But not through sales written by or laws written by the manufacturer, that I know of.

Q. In other words, it was a matter of it costing you more to send men to Bakersfield or the contractor more to send them to Bakersfield than someone up in the area? A. That is correct.

Q. That reminds me of another question. Did you ever, prior to this termination date around February 19th have a crew of men established in San Bernardino?

A. No, we didn't establish a crew of men in San Bernardino at all.

Q. Did you have a crew of men down here prior to the termination date? A. Oh, yes.

The Court: What do you mean by "down here"?

Mr. Ackerson: In Los Angeles.

The Witness: In the Los Angeles area, that is correct.

(Testimony of Walter R. Waldron.)

Q. (By Mr. Ackerson): They were the only employees you did have, regular employees?

A. Yes, that is correct.

Q. At this meeting now, and I am going to call your [97] attention to another document, Mr. Waldron.

Mr. Ackerson: May I have this marked Plaintiffs' Exhibit next in order for identification?

The Clerk: Plaintiffs' 11 for identification.

(The document referred to was marked Plaintiffs' Exhibit 11 for identification.)

Q. (By Mr. Ackerson): Mr. Waldron, can you identify this document, Plaintiffs' Exhibit 11 for identification?

A. Yes, the Louis A. Downer Company of Riverside, who is an acoustical contractor, received this letter informing them of our activities in his [98] area.

Q. How did you receive it?

A. Mr. Downer gave it to us to show us their feeling, that any negotiations that he and we would work out was certainly all right by the manufacturers. In other words, we could sell him or he could sell us, or whatever it happened to be. And it showed here that anything that we worked out together was perfectly all right.

Mr. Ackerson: Mr. Black, I assume that we can stipulate to it—I realize that the testimony is just a little bit hearsay—but we can stipulate, I assume,

(Testimony of Walter R. Waldron.)

that that letter was sent by Flintkote to the Downer Company?

Mr. Black: Yes, so stipulated.

Mr. Ackerson: Then I will offer it in evidence.

The Court: What is the exhibit number?

Mr. Ackerson: Exhibit No. 11.

Mr. Black: Would you give me the date of that, Mr. Ackerson?

The Court: Subject to the stipulation, it is received.

(The exhibit referred to was received in evidence and marked as Plaintiffs' Exhibit No. 11.)

Mr. Ackerson: The date is January 17, 1952, Mr. Black.

I would like to read just a portion of it to the jury, and then I will hand it to the jury for further perusal.

It is addressed to the Louis A. Downer Company—which, I might interpolate by stating that that is not the Downer [99] Company mentioned as a co-conspirator; I think it is a son or a brother operating a different company over in San Bernardino—it is addressed to the Louis A. Downer Company, 6840 Valencia Street, Riverside, California, and it states in part:

"Your letter of January 14, 1952, to our Mr. Bob Ragland, has been referred to the writer for answer.

"This company, while offering no exclusive fran-

(Testimony of Walter R. Waldron.)

chise agreement, have recently placed the acoustical tile line in the Riverside and San Bernardino area with the aabeta company of 901 Waterman Avenue, San Bernardino.

"We respect our customers' position in every way possible without a binding agreement of any exclusive franchise, which we believe is to the advantage of both the contractor and the supplier.

"For the above reason, we regret that we will be unable at this time to offer you our acoustical tile line on a direct basis. You are at liberty to make whatever arrangements you desire in working with the aabeta company to obtain Flintkote acoustical tile, and we believe that our customer will offer you full cooperation."

Then it is signed "B. B." for B. Baymiller.

Q. Now, Mr. Waldron, do you have personal knowledge as [100] to the area in which the Louis A. Downer Company operates?

A. Yes. How do you mean, area?

Q. Do they do contracts outside of the Riverside-San Bernardino area? A. Oh, yes.

Q. They do have contracts to your knowledge in the Los Angeles area?

A. Yes, that is right.

Mr. Black: If the court please, I want to renew our objection to this line of testimony on the theory that it can't have any bearing whatever on what arrangement the plaintiff may have made with the defendant in this case. As to what some other sup-

(Testimony of Walter R. Waldron.)

plier may have done with the Louis Downer Company, that can't possibly be binding on us or illuminating in any way.

The Court: I admitted the other evidence that you objected to on the basis that counsel was probably trying to give us a general picture of the practices of the industry and that that might be useful as a background for the particular practices in this case. But I wonder, Mr. Ackerson, aren't we getting so far collateral that it would tend to confuse rather than assist?

Mr. Ackerson: I think there is a little more basic purpose for this background material, your Honor. For instance, the price—I don't like to use descriptive words—but the [101] method of distribution to certain acoustical tile contractors, and so forth, because actually that forms the basis you have to have to compete. Now we haven't alleged, and we can't prove, that we can't buy tile at all. We can't compete by paying 17 per cent and 27 per cent for tile and be dependent upon our competitors to get it for the most part.

This letter here I think is material in this respect, that there is no statement in there, as I read it, of any objection to the Louis Downer Company buying tile from the plaintiffs and selling it or installing it at any place they want to.

The letter acknowledges that they have no exclusive franchises, and by that I expect to bring out that that includes territorial restrictions; that

(Testimony of Walter R. Waldron.)

it is simply inconsistent with the position and the action taken against my clients.

I am not, as far as this particular letter goes, too concerned with it, but I think there will be other circumstantial evidence tending toward inconsistency, that is all, the position that Mr. Black stated this morning which I no longer have to anticipate.

Mr. Black: Just a moment. We are talking about the letter which seems to me to be an entirely different thing from what this witness may know about what rights Louis Downer & Company may have had as to where they were entitled to operate. They are not a Flintkote contractor. [102]

Mr. Ackerson: I think on that ground, your Honor, I have to think that Mr. Black is correct.

The Court: You concede the objection?

Mr. Ackerson: I concede the objection.

The Court: The objection then is sustained.

Q. (By Mr. Ackerson): I want to ask you whether anything else happened at this meeting. Was anything said there concerning orders in the Los Angeles area?

A. You mean commitments?

Q. Yes.

A. Oh, yes, they assured us that any commitments we had at the time——

Mr. Black: Just a moment. Please tell us who said that rather than "they."

The Witness: I am sorry, Mr. Black.

The Court: Just tell us what he said. I am sure

(Testimony of Walter R. Waldron.)

the jury may not think it was an assurance from the words, but then again they might. But they should have the privilege of determining it rather than having to rely upon your interpretation that it amounted to an assurance.

Q. (By Mr. Ackerson): Who said what and what did they say?

A. Mr. Thompson told us that we would be assured of any commitments that we had made, materials to be installed, [103] contracts, sales, and so forth.

Q. Did you subsequently receive some material from the Flintkote Company?

A. Yes, they had us in a meeting and Mr. Baymiller went over our contracts that we had committed ourselves to, and made notes of them for shipment when we wanted them, except two. He denied two commitments we had, and that was to the Louis A. Downer Company. These two commitments, of which I believe you still have the old purchase orders, were to be used by them on a school job some place and I believe it was the Orange Coast College.

Q. Where was that?

A. That was somewhere southeast of town, the Long Beach area, or somewhere over in that area.

Q. Do I understand then that Mr. Thompson lived up to his statement that he would supply you sufficient tile to finish your commitments?

A. He did not.

Q. Excepting for those two orders from the

(Testimony of Walter R. Waldron.)

Louis Downer Company? A. Yes, he did.

Mr. Ackerson: Now will you mark those in order, please?

The Court: Plaintiffs' Exhibit 12 for identification.

(The exhibit referred to was marked as Plaintiffs' Exhibit No. 12 for identification.) [104]

Mr. Ackerson: And this next document dated March 3rd as plaintiffs' exhibit next in order for identification.

The Court: Plaintiffs' Exhibit 13 for identification.

(The document referred to was marked as Plaintiffs' Exhibit No. 13 for identification.)

Q. (By Mr. Ackerson): I show you Plaintiffs' Exhibit 13 for identification and ask you if that is a billing from The Flintkote Company for tile to perform these commitments Mr. Thompson mentioned.

A. Yes, that is the billing. We either received this one or a copy.

Q. And I call your attention to Plaintiffs' Exhibit 12 for identification and ask if the same thing is true about that?

A. Yes, I believe that is correct.

Mr. Ackerson: I will offer Plaintiffs' Exhibit 12 in evidence at this time.

Mr. Black: No objection.

The Court: Admitted.

(Testimony of Walter R. Waldron.)

(The document referred to was received in evidence and marked as Plaintiffs' Exhibit No. 12.)

Mr. Black: Could we have the invoice number so we can get straight which is which?

Mr. Ackerson: 28278 is Exhibit 12. [105]

And I will offer Plaintiffs' Exhibit 13 for identification in evidence, which is invoice No. 22875.

Mr. Black: Thank you.

The Court: Admitted.

(The document referred to was received in evidence and marked as Plaintiffs' Exhibit No. 13.) [106]

Q. (By Mr. Ackerson): Now tell us, if you can in any more detail, just how this question of commitments in Los Angeles, if they were in Los Angeles, came about in this meeting of Mr. Thompson, Ragland and Baymiller. Did you bring it up or did they bring it up? What was said by each of them?

A. Mr. Thompson was the spokesman on the final details, and he asked us to bring in whatever commitments we had, contracts, sales and any other where acoustical tile was concerned, and they would honor them.

Q. By bringing them in, he meant back to the Flintkote Company?

A. Yes, they asked us to come over there, show them to them, which we did, and I showed them to

(Testimony of Walter R. Waldron.)

Mr. Baymiller at a later time after this first severance meeting.

Q. And did I understand you to say that Mr. Baymiller at that time took notes on the commitments you brought to him?

A. Yes. He noted the amounts, he didn't keep the contracts but he noted the amounts, job name and probable starting dates, I think, for the delivery time, a certain number of given months ahead or weeks ahead, or however soon we had to have them, except he refused to honor the Louis A. Downer Company purchase orders.

Q. Did he state any reason to you why he refused to [107] honor that, the Louis Downer orders?

A. I asked him why. He said that is a commitment, that they were not honoring the Louis A. Downer & Company commitment, and that they couldn't, they just couldn't honor that purchase order. There were two of them. He said, "I just can't do it."

And the significant thing that I think ties that together is, a man came up at that very moment—I don't know who he was—apparently a salesman or an office personnel, and he mentioned to Mr. Baymiller that they had been successful in stopping the 24 x 48 inch acoustical tile consigned to the Louis A. Downer Company by way of the McNulty Acoustical Company in Bakersfield, that was going on the Orange Coast College. So that ties in with the refusal or denying our commitments to the Louis A. Downer Company. [108]

(Testimony of Walter R. Waldron.)

Mr. Ackerson: May I ask one question before you——

Mr. Black: Go ahead.

Q. (By Mr. Ackerson): This statement, you don't know who made this statement, the individual? A. No, I don't.

Q. It was made to Baymiller in your presence?

A. That is right. I was sitting at his desk.

Mr. Ackerson: Thanks, Mr. Black.

Mr. Black: I will move it be stricken as incompetent, irrelevant and immaterial, not binding on the defendant in any way. There is no authority proved by "this person." We don't know what his status was or whether he had the right to make such a statement.

It seems to me it is too far afield to form the basis of this witness' deduction as to motives involved in the case.

The Court: Mr. Black, the court was surprised. Usually when a witness starts volunteering something of this sort, there is an immediate objection and the court, of course, will always stop the witness, because it is not proper procedure.

I am afraid you sat back to see what he was going to say.

Mr. Black: I stopped, if the court please, at counsel's expressed request. He asked me to let the witness finish his statement so he could understand what it was.

The Court: Just bear in mind that judges are inclined, [109] if counsel waits until a state-

(Testimony of Walter R. Waldron.)

ment which manifestly from the beginning is legally an improper one, and counsel waits to see whether it turns out to be an answer which they are willing to live with or one they want stricken, judges are inclined to say, "You took the risk. You live with the results."

We won't do that to you this time, Mr. Black, in view of the attitude between you and Mr. Ackerson generally.

That entire answer is stricken. I am just warning you as to the future.

Mr. Ackerson: No objection, your Honor.

Q. (By Mr. Ackerson): Mr. Waldron, would you recognize Mr. Baymiller's handwriting if you saw it?

A. Only his signature. I have seen that several times. I believe I could recognize that.

Q. Well, I am not going to ask you to identify the handwriting. But I am going to ask you if you can identify the subject matter on this plaintiffs' exhibit for identification next in order.

The Clerk: Plaintiffs' 14 for identification.

(The document referred to was marked Plaintiffs' Exhibit No. 14 for identification.)

Q. (By Mr. Ackerson): Mr. Waldron, Plaintiffs' Exhibit 14 for identification is composed of two documents. I am calling your attention to the second page of that exhibit, [110] and I will ask you if the substance of that handwriting refers to the jobs to which you were committed and to which

(Testimony of Walter R. Waldron.)

you called Mr. Baymiller's attention on this occasion you testified to.

A. Yes, there are three different jobs here. However, I am not sure that that was all at the moment.

Q. But you do recognize these two jobs——

A. Yes.

Q. ——as jobs you called to Mr. Baymiller's attention?

Mr. Ackerson: Mr. Black, I will postpone offering this at this time in view of the other document.

Does your Honor recess around 4:00 or do we go over? This is a stopping point, if that is in your mind.

The Court: I had in mind carrying on for about a half hour. If that is inconvenient to anyone, I wish you would bear in mind that business is quite concentrated here now.

I have been away for a month sitting in another division, I just got an order from Judge Denmam to go to another division for another month, and a lot of cases must get cleared up before going.

So I would rather work until 4:30 and start at 9:30 in morning.

Mr. Ackerson: The 9:30 time in the morning would be quite convenient. I am afraid I anticipated incorrectly. I do have a rather important appointment about 4:30 in the [111] office. I will make some other arrangements if we can't make up the time some other way.

The Court: Will 9:30 be convenient with you, Mr. Black?

(Testimony of Walter R. Waldron.)

Mr. Black: Yes.

The Court: Will it be inconvenient to any member of the jury to be here at 9:30 tomorrow?

(No response.)

The Court: The case will then stand in recess until tomorrow morning at 9:30 and we will try to work until tomorrow afternoon at 4:30. On Monday we will not convene until after noon. I have a motion calendar on Monday morning.

Members of the jury, let me call your attention to the fact that there are a lot of people interested in a case of this kind, connected with it, employees and friends, witnesses, attorneys for the various parties and concerns, and just before and after court time and at recess they mill around in the hall and talk about the case.

You have heard me tell you yesterday that you are not to receive any information outside of the court, and not to listen to discussions or participate in any way.

Just to make it easier for you to follow that, may I ask you when you leave, to leave through your jury room on the third floor and don't return to the corridors on the second floor at all. [112]

Then you will miss being put in close contact with these people who will naturally be talking about the case.

When you come in in the morning, if you will take the elevator to the third floor, go to your jury

(Testimony of Walter R. Waldron.)

room and wait there until you are called down into court, and it will save the possibility of embarrassment by your coming in contact with some interested person in the hallways on this floor.

We are now in recess until tomorrow morning at 9:30.

(Whereupon, at 4:05 o'clock p.m., Thursday, May 5, 1955, an adjournment was taken to Friday, May 6, 1955, at 9:30 o'clock a.m.) [113]

May 6, 1955—9:30 o'Clock A.M.

The Court: I understand that there is an ex parte motion. Maybe it won't be ready until 10:00 o'clock. Is it ready now?

The Clerk: No, sir.

The Court: When they come in we will take it up before the recess and we will plan on the recess at about 10:45.

Mr. Ackerson: We will have the witness resume the stand.

WALTER R. WALDRON

the witness on the stand at the time of adjournment, resumed the stand and testified further as follows:

Direct Examination
(Continued)

By Mr. Ackerson:

Q. Mr. Waldron, when we adjourned last evening——

The Court: Just a moment. I had better tell

(Testimony of Walter R. Waldron.)

the clerk about our action in a case before I forget it.

The Carl Parker Enterprises, which is set for trial here Monday, will be tried Tuesday at 11:00 o'clock. The case is continued until Tuesday at 11 o'clock on the court's own motion. It is a short matter.

You may proceed.

Q. (By Mr. Ackerson): As I stated, Mr. Waldron, you were testifying at [115] the close of yesterday's session concerning the so-called termination meeting in or about February 19, 1952. Do you recall any other conversations at that meeting that you have not covered as of yesterday?

A. I believe we covered the severance—the termination in their voicing to us at that time— and of course it was like exploding slightly a bomb in our office—but I asked Mr. Baymiller if they wouldn't hold up, or why they didn't hold up, to our agreement, and that I said the pressure must have been terrific. And he said, "Yes, we had the pressure all right."

Q. Was there anything else you recall, or does that about cover that meeting? I mean that plus your testimony of yesterday.

A. I believe I covered the fact that they said that they couldn't do anything on their own behalf, that it came from their superiors.

Q. Did you ever have a conversation with Mr. Ragland concerning any objections to your going into business? A. To going into business?

(Testimony of Walter R. Waldron.)

Q. Or continuing in business? Did you ever discuss a subject like that with Mr. Ragland?

A. Oh, yes, many times. Not many times, but there were times when he could stop by our shop, and we would go to the nearest cafe, which was a Stan's Drive-in I believe, [116] and we discussed the chances of the opposition, or I will say the competition, of being particularly perturbed and angry when they learned that we were in business.

And he knew that.

Mr. Black: Just a moment. What did he say?

The Witness: Pardon me.

Q. (By Mr. Ackerson): What did he say?

A. Mr. Ragland would say that there is no reason to worry about it, that The Flintkote people will back up their word.

Q. Did Mr. Ragland ever call any specific instance to your attention where a complaint had been made about you doing business?

A. Yes, right along about that time——

Mr. Black: Just a moment, before the witness testifies on that. Let us have the time and date and the circumstances.

Mr. Ackerson: Thank you.

Q. Will you state if you had such a conversation, where and when it took place?

A. Yes. At our office. Mr. Ragland came in and was telling us about——

Q. And when was that, Mr. Waldron?

A. This was prior to the severance date, shortly after that. [117]

(Testimony of Walter R. Waldron.)

Q. Can you estimate the amount of time prior to this February 19th date that this occurred?

A. Yes, I would say a couple of weeks or even along about the 1st of February.

Q. And what occurred—and that took place at your Los Angeles address? A. Yes.

Q. What did Mr. Raglund tell you?

A. He was telling us that Mr. Gus Crouse—Coast Insulating Products—came down and was particularly angry, and that he got out of line——

Mr. Black: I would like at this time to interpose an objection, if the court please, on the ground that Mr. Ragland is not shown to have authority to make any statements binding on the Flintkote Company, and that the evidence proffered is incompetent, irrelevant and immaterial. There is no authority of Mr. Ragland to make statements of that sort of an historical character as to what had happened which has been shown.

Mr. Ackerson: I think perhaps, your Honor, that this is in the form of an admission, in the first place. In the second place, I think Mr. Ragland's past conduct throughout this period shows that he was an authorized agent.

The Court: Are you contending that Ragland was a co-conspirator? [118]

Mr. Ackerson: Certainly. Well, he is either a co-conspirator, an agent of the Flintkote people—I mean there is no doubt about the latter.

The Court: As a general principle of conspiracy

(Testimony of Walter R. Waldron.)

law, every person who is a co-conspirator of course is presumed—that is, every person who is alleged to be a co-conspirator with the person on trial as conspirators, is deemed to be their agent once he is shown to be a member of the conspiracy, and statements which are made in furtherance of the conspiracy may be admitted.

I think the courts here have generally been admitting statements and doing so subject to a motion to strike if it does not appear that there develops a jury question as to whether there was a conspiracy, as to whether the person who is on trial and the persons whose statements have been received, have been connected to it.

Mr. Ackerson: I think that is right.

The Court: Unless you have some other way you would like to handle it, I am disposed to adopt that as a policy of this case, as the other judges have done in the cases tried before them, and entertain a motion to strike if the connection is not provided by sufficient evidence to create a jury question.

Mr. Ackerson: I don't know of any other way you can try a case like this, your Honor. [119]

Mr. Black: Your Honor please, it may be we are at that point where we should address ourselves to your Honor in the absence of the jury, because I think that we would like to be heard somewhat extensively on that proposition.

The Court: Then, Mr. Ackerson, can you for the next few minutes, between the time we take our morning recess, go to some other question and we

(Testimony of Walter R. Waldron.)

will hear counsel on this in the absence of the jury when we take the morning recess.

Mr. Ackerson: I might suggest, your Honor, we have been covering these conversations with agents of Flintkote for nearly a day, and I hadn't conceived that Mr. Black's lengthy argument would be directed at this sort of thing. There are other types of evidence where it might be appropriate.

Mr. Black: Yes, but I think the court has indicated a treatment of the entire subject which I think brings about just as an appropriate an occasion here on the subject as anything else, because it ties into the same general line of argument, and I think for that reason it would be well to get onto another subject if you have one and let us present this all at one time.

The Court: If you have your schedule of questions organized, Mr. Ackerson, I will—it is not convenient to deviate from it inasmuch as there has been no suggestion of a reason why we should depart from the usual rule up to now, and I would think that the suggestion that we adopt some [120] other rule should have been set forth in a trial memorandum.

Mr. Black: That is one of the very points at issue, if the court please, as to whether it is the rule. We have some authorities on that that we would like to present, and I really believe it would be inappropriate to make that argument in the presence of the jury.

The Court: Why weren't they presented before,

(Testimony of Walter R. Waldron.)

Mr. Black, because this is the usual procedure?

Mr. Black: The question hadn't arisen in the trial until now.

The Court: You anticipated it would, though?

Mr. Black: We anticipated it would.

The Court: Did you file a trial brief?

Mr. Black: We have not filed any trial brief.

The Court: Objection overruled. I will not have so many of these but what I can strike them if it turns out to be illegal after hearing your argument, and I will hear you fully at the time the jury takes its morning recess.

Mr. Black: Thank you [121]

Mr. Ackerson: I am about through with this particular conversation. I think this is the last such conversation.

Q. (By Mr. Ackerson): Will you relate that conversation with Mr. Ragland?

A. Did I have——

Q. Will you relate that conversation you had with Mr. Ragland you started to talk about?

A. Yes. He was telling me that Gus Crouse of the Coast Insulating Products, a distributor of theirs——

Q. What position, if you know, did Gus Crouse hold with Coast Insulating?

A. He was general sales manager. At least, he was at that time.

Q. State what Mr. Ragland told you.

A. Mr. Ragland said that he came to their office —or his office and his desk, and got so abusive

(Testimony of Walter R. Waldron.)

that he had to tell him that he would have to leave him and when he could be more rational he would return.

Now, he was telling him that they wouldn't stand for us, the aabeta co., selling acoustical tile.

Q. Did you say——

Mr. Black: Just a moment. I wish the record to show we move to strike this answer in pursuance of our objection.

The Court: Ruling will be reserved until after I hear your argument. [122]

Members of the jury, there is objection to this testimony. The objection is a legal one and you should keep in mind that you are judges now; for the purpose of the facts of this case you are judges of the court as much as I am.

For the purpose of the facts of the case you are more a judge of the court than I am, because your decisions on the facts will be accepted by every higher court to whom this case might go.

Now, it is a quality of judges that they disregard evidence which is not proper. I think this evidence is proper and that this procedure is proper.

Mr. Black, who, with all respect to Mr. Black and in deference to the fact we are all growing older, to me, I think, is senior. This Mr. Black is a leading member of the Bar.

Mr. Black thinks this particular evidence is not admissible. Since the question is raised at the eleventh hour, after we are in trial and under our procedure, being one which would reasonably be an-

(Testimony of Walter R. Waldron.)

ticipated should have been raised by a pre-trial brief, I am going to let it in until recess. But I might hereafter instruct you to disregard it. So just keep your thoughts regarding the case organized to where this particular line of questioning will be pegged so that you will be in a position to disregard it if it becomes the court's instruction later you do so. [123]

In the interest of expedition we are going to have it now.

Mr. Black: May the record show, if the court please, there was no pretrial had in this case. Any inference we were in default in some way, I don't think is quite fair to us.

The Court: Well, as to there not being a pre-trial, I think we are all at fault. But that wasn't what I was commenting on, Mr. Black. It was the fact you didn't file a brief.

There is a local rule which requires that a certain number of days before the trial each party file a memorandum with the court, pointing out the legal questions anticipated to arise, pointing out the law they wish the court to read on it and what their position is going to be on those questions.

That rule should particularly be observed in cases which are not the ordinary garden variety which occur here every week.

Now, in this case, so far as I know, neither side has filed a trial brief.

Mr. Ackerson: That is correct.

Mr. Black: I think if the court will be fair to

(Testimony of Walter R. Waldron.)

both of us usually that is handled, is it not, in connection with a pre-trial hearing and notice to counsel as to the dates on [124] which that is required.

I may have erred on that, but I just assumed that, there being no pre-trial hearing, the court wasn't requiring the filing of a memorandum.

The Court: The fact a pre-trial hearing wasn't ordered in this case did not repeal the published rules of this court, which were adopted by all the judges and go back to the days of Judge James, who has been dead now, I think, 15 years. But those rules have been published and republished in the Journal and you can buy them down at Smith's law bookstore for 50 cents. Most of the lawyers practicing before the court do obey them.

The result of not doing so is to put the jury in a position where you are going to require snap judgments as we go along. And lawsuits should be tried at a pedestrian pace, with all the legal points considered.

I am going to try this one with the law as I remember it, until you point out some new development showing the law is either different or my memory has become twisted.

The failure to file a trial brief weighs as heavily on Mr. Ackerson as it does on you.

Mr. Ackerson: That is true, your Honor. Frankly, I hadn't anticipated that there would be objection—not to this testimony—but to what I believe Mr. Black has in mind until I was notified the

(Testimony of Walter R. Waldron.)

other day. I probably am at [125] fault in not anticipating it, anyway.

But, in view of the way the Complaint was drawn, I think it was clearly set out there that I intended to use the type of proof which has not yet been before your Honor, and which will be the subject matter of this argument.

The Court: Well, I am glad you are both sufficiently busy and prosperous that perhaps that is what has led to your disregarding the rules.

Mr. Ackerson: Your Honor, that appellation may apply to Mr. Black. I am just busy.

Mr. Black: I would like to join in that, your Honor.

Q. (By Mr. Ackerson): You were talking about Mr. Crouse's conversation with Mr. Ragland. Did he relate any further part of the conversation, or was that all?

A. That is as I remember it at the moment, and, anyway, Bob told me that he had to leave Mr. Crouse and then come back at a later date when he was quieted down.

But Mr. Crouse called me and told me about that incident.

Mr. Black: Just a minute. That is objected to for a further reason that this is an alleged conversation between a third party, not in the presence of The Flintkote Company, and in no way binding on The Flintkote Company.

The Court: Isn't Crouse——

Mr. Ackerson: Crouse is strictly individually al-

(Testimony of Walter R. Waldron.)

leged [126] as a co-conspirator, your Honor. I think it may be subject to connection, but I think the rule is clear that co-conspirator's acts infer admission of an action in furtherance of a conspiracy and is binding, in any event.

Mr. Black: Not until the membership of the other party in the conspiracy is proved.

Mr. Ackerson: Well, we can't prove——

The Court: You can't prove these cases all at once. And the evidence is admitted subject to a motion to strike if it is not connected up.

Q. (By Mr. Ackerson): Will you proceed, Mr. Waldron?

A. Mr. Crouse, who is a social acquaintance of mine and has been for some time, called my home in the evening.

Q. Along about what date was it, before or after the termination?

A. It was after the severance. He tried a couple of times in days past and I wasn't home. However, he called this particular time and my wife answered the phone. He told her who he was and I was called to the phone.

And he told me that he didn't want me to feel that there was anything personal about his being chosen to front for the organization, association, which is the contractors association, and their own interests, to force this termination of selling us acoustical tile.

Mr. Black: That is objected to for the further reason [127] that it doesn't purport to be a state-

(Testimony of Walter R. Waldron.)

ment during the course of the alleged conspiracy, but an alleged statement, or, admission of some other person after the events had occurred.

We renew the motion to strike on the further ground as stated.

Mr. Ackerson: But an admission, I suggest to your Honor, is an admission of the very act that plaintiffs claim caused this termination.

The Court: What date is alleged as the termination date?

Mr. Ackerson: February 19th, I believe we have established, your Honor.

The Court: Of what year?

Mr. Ackerson: Of '52.

The Court: What is the date of the alleged conversation?

Mr. Ackerson: The conversation was subsequent to that concerning acts prior to February—acts of Crouse himself prior to the termination date.

The Court: The motion is granted. The conversation of a person not before the court, a conversation which would ordinarily be hearsay, in order to be admitted would have to be one made in furtherance of the conspiracy.

If the conspiracy had ended, it might in protection of the conspirators, but it could not be in furtherance of the conspiracy after the conspiracy is over. [128]

I think, under the general rule which is applied to cases of this character, that you are not absolved from the hearsay objection.

(Testimony of Walter R. Waldron.)

Mr. Ackerson: No, I don't contend that, your Honor. I don't mean to argue after your Honor has ruled, but I wonder if your Honor understands the plaintiffs' position here.

The evidence will show that Mr. Crouse was one of the contractors and did directly contact Mr. Ragland and others at The Flintkote Company for the purpose of making them cease selling tile to the plaintiffs.

This conversation, though it occurred after Flintkote had actually terminated, was an admission of Crouse's part in causing the termination.

My theory, of course, was that an admission of an overt act that was in furtherance of the conspiracy would come within the general rule.

The Court: It would if Crouse were being——

Mr. Ackerson: I think maybe I will ask your Honor to permit me, during our more extensive argument, to ask you to recall your ruling if your Honor feels so at that time.

The Court: Yes, you can argue it at the time Mr. Black argues his motion.

Q. (By Mr. Ackerson): Then at this conversation with Mr. Ragland, did he name other acoustical tile contractors that had approached him concerning your doing business? [129]

A. Yes, he said a Mr. R. E. Howard——

Mr. Black: It will be understood our objection goes to this?

The Court: Yes.

(Testimony of Walter R. Waldron.)

The Witness: ——was down there complaining, also. [130]

Q. (By Mr. Ackerson): And what did he say that Mr. Howard said, if anything?

A. I don't know any exact words, except he mentioned that they were trying their best to force an issue to stop our operations.

Q. Now, Mr. Waldron, after your source of supply of acoustical tile was terminated by The Flintkote Company, were you able to carry on your acoustical tile business?

A. Not for some time.

Q. Did you do any bidding after that date for some time and, if so, how long a time?

A. We didn't do any bidding for a couple of months other than with the material we have had before.

Q. By the "material you have had before," do you mean the material you got in this first shipment of tile? A. Yes.

Q. Can you explain just how you did carry on after that termination with respect to your acoustical tile activities?

A. The acoustical tile was curtailed, and later on, a month or two or three, we were able to line some materials from lumber yards and the E. J. Stanton people had some, the Harbor Plywood, and we were able to eventually get some.

However, the Harbor Plywood supply was not an AMA rated [131] material, so it was limited to where we could put it, and any of this material we

(Testimony of Walter R. Waldron.)

had to pay a premium of around 17 per cent to 20 per cent greater than we had paid before.

Q. Can you name some of these places where you bought this tile at that price?

A. Yes, we bought from the Harbor Plywood people, E. J. Stanton people, and Louis A. Downer, acoustical contractor.

Q. Do you have personal knowledge of——

Maybe Mr. Black won't object to the introduction of this.

(Exhibiting documents to counsel.)

The Court: Members of the jury, don't hold it against either counsel that they object or make motions to have evidence held out. That is one of the things they are paid to do.

The Clerk: Plaintiffs' Exhibit 15 for identification.

(The document referred to was marked Plaintiffs' Exhibit No. 15 for identification.)

Q. (By Mr. Ackerson): Mr. Waldron, can you identify this document that I am showing to you marked Plaintiffs' Exhibit 15 for identification?

A. Yes, that is the Pioneer-Flintkote brochure on their price list. [132]

Q. Can you point out in the price list the price of 12x12 one-half inch acoustical tile?

A. Yes, that is 10 cents a square foot.

Q. And can you point out the other commonly used sizes of tile there?

(Testimony of Walter R. Waldron.)

A. Well, the 12x12 squares are the most commonly used, and the majority of them is one-half inch thick.

Q. What other thicknesses do you use also as a common matter?

A. Well, three-quarter inch, 12x12 three-quarter inch, would probably be the next step in treatment.

Q. And what is the price of that on this Exhibit 15 for identification?

A. Three-quarter inch 12x12, it is 14 cents a square foot on this exhibit.

Mr. Ackerson: I will offer this at this time.

Mr. Black: No objection.

The Court: Received.

(The document heretofore marked Plaintiff's Exhibit No. 15 for identification was received in evidence.)

Q. (By Mr. Ackerson): Mr. Waldron, being in the sales end of the acoustical tile for so many years, do you have personal knowledge as to the prices charged by the other manufacturers for AMA approved tile of those sizes? [133]

A. Yes, they are parallel and equal to this price list.

Q. By that you mean identical or similar or what? A. Yes, I am sure they are that way.

Q. In other words, one-half inch tile is 10 cents a square foot?

A. In my experience with other companies, that is what happens, yes.

(Testimony of Walter R. Waldron.)

Q. And the other is 14 cents a square foot?

A. Yes, I believe that is right.

Q. What price per foot did you have to pay from these lumber yards and acoustical tile contractors after you were terminated?

A. Well, the best we could do was 15 per cent more and occasionally 25 per cent more on each variety.

Q. Can you recall those two orders of tile you purchased from the Louis A. Downer Company?

A. Only vaguely. I don't have the amounts or sizes in mind.

(Exhibiting documents to counsel.)

Q. (By Mr. Ackerson): Do you recall, Mr. Waldron, what percentage—or did I ask you if you recalled what percentage that you paid more than you would have paid had you purchased the tile from Flintkote or directly from a manufacturer—I am referring to the Louis A. Downer [134] purchase?

A. Yes, I think that was in the neighborhood of 25 per cent or perhaps 30 per cent. [135]

Q. Now, during the time you were with the R. W. Downer Company, Mr. Waldron, can you estimate the approximate amount of tile you were able to sell for that company per month?

A. Yes, I would say it would average around 40,000 feet a month of 1½-inch units.

Q. That would be not quite a carload, would it?

A. No, there were times when a month would be

(Testimony of Walter R. Waldron.)

two carloads. But perhaps it would settle off later. I am referring to what I can estimate it being a yearly average.

Q. I see. What was your monthly earnings at R. W. Downer Company, approximately? I realize you don't have records on it.

A. I think the last check I got with them was around $1,500.00. But I don't know the average throughout the year, but it would be probably around eight hundred to twelve hundred, somewhere in there.

Q. Somewhere between eight and twelve hundred? A. I believe it would be.

Q. That was the amount of money you were making prior to going into business yourself?

A. Yes.

Q. After your supply was terminated, were you able to continue doing business with your established general contractors in this area? [136]

A. Oh, no, their volumes were too great for us and we had no assurance of being able to supply a job.

Q. Can you explain that statement? I mean, why didn't you have any assurance of a supply? You were able to buy acoustical tile at enhanced prices, were you not?

A. The bids, the bidding was difficult. Our markup, by the time we paid the 15 to 25 per cent, we would lose the job, because we were overpriced. That happened.

And then we couldn't be sure through the lum-

(Testimony of Walter R. Waldron.)

ber yards of getting proper sizes of tile or proper delivery at that time.

Q. Could you be assured at the lumber yards or the other acoustical tile contractors, that they could or would supply the amount necessary for any substantial job, the amount required on a substantial job? A. The other acoustical contractors——

Q. You mentioned Louie A. Downer Company as one supply you had. And then referring to Louie A. Downer Company, could you depend on him to be there with the tile when the job was ready?

A. No, not completely. He cooperated with us as best he could. But he had only a 12x12 tile, I believe, at that time. And most of the market jobs we were working in and wanted to work in with people we had been doing business were 24x24, and he couldn't supply that one at all. [137]

Q. Well, let's take the lumber yards, do they carry stock on hands at all times——

A. Very little.

Q. ——sufficient to do a sizeable job?

A. No, no, that would have to be arranged months ahead.

Q. Well now, let me ask you this further question, Mr. Waldron: When you, aabeta co., as a subcontractor takes a subcontract from the general contractor, is it the ordinary thing that you are bonded under a completion bond on such a job as that?

A. No, rarely do we have a completion bond. However, we have a contract that is virtually the same.

(Testimony of Walter R. Waldron.)

If we can't perform they will call in other people and backcharge us for it. That is in all of the contracts.

Q. That is in your subcontract with the general contractor? A. Yes.

Mr. Ackerson: If your Honor please, I find it a little difficult to proceed further at this time without disposing of this legal question which has been posed to the court.

I am wondering if Mr. Black would like to proceed on cross-examination thus far, with the idea we can make whatever arrangements——

The Court: I note that you have stayed away from the [138] type of question which Mr. Black considers objectionable.

I said I didn't require you to do that. We are going to proceed and the jury has been told if evidence is stricken they are not to regard it. If you think we had better dispose of the issue, we will give the jury a recess now.

Mr. Ackerson: I think both sides should be in a position to give their views freely, without regard to the jury being present. I am not speaking for myself any more than Mr. Black. I think that would be probably the most expeditious way of doing it.

The Court: Under the circumstances, the jury will retire to the jury room and remain there until we send for you. [139]

(The following proceedings were had in open court outside the presence of the jury:)

(Testimony of Walter R. Waldron.)

Mr. Black. I am really sorry, your Honor, about this trial brief matter. I perhaps had gotten the impression that it was integrated with the pretrial order to the extent that we would have been glad to do it if we realized the court wanted it. We assumed, perhaps unfortunately, that the instructions and the authorities covered the situation.

We will be glad to file a brief if the court wants us to do so over the week end.

The Court: We have gone so far in the case now we probably can do as well without having a trial brief, because you could not get it in before the case is over.

Mr. Black: We could get it in over the week end.

The Court: Then you would have to work Saturday and Sunday.

Mr. Black: That is all right.

Mr. Ackerson: I think I am going to have to anyway, but I would like to go along and argue the matter. I do have some authorities but they are along the line of the general principle line. I think those matters can be disposed of on general principles.

Mr. Black: I think so.

The Court: You are both in default under a local rule requiring you to file briefs. The court accordingly hasn't [140] read what you probably would have liked to have the judge read so that I can pass on many of these issues. You may file a brief if you wish, but since we have come this far you do not have to unless you want to.

(Testimony of Walter R. Waldron.)

Mr. Ackerson: Very well. Perhaps then the way to proceed here, Mr. Black, is for me to probably state the documents that are coming up, if that is agreeable with you.

Mr. Black: Let us do it that way, then.

Mr. Ackerson: First of all, your Honor, there is this question—and this is the basic question Mr. Black has in mind—I have alleged as the purpose, design and effect of this conspiracy, protection and continuation of this monopoly of installation among the acoustical tile co-conspirators. Basically in its simplest form the complaint alleges that these people did have a monopoly, that they were fixing prices and they were allocating bids among themselves, irrespective of Flintkote's personal knowledge of every detail of this precise existing conspiracy, the basic thing that Flintkote did of course was to come in after being told to, to come in and agree to eliminate this competition that was wrecking the plan.

Now this evidence relates to what those contractors were doing, and therefore the motive and purpose, the real motive and purpose of Flintkote in aiding and abetting—and I say joining the plan—the evidence I think will show that [141] Flintkote, and I think it has shown, had three established dealers among this group. In other words that was its total output of Flintkote acoustical tile in this area.

Therefore when someone like Gus Crause, somebody from the other Flintkote dealer, and Mr. How-

(Testimony of Walter R. Waldron.)

ard, a third Flintkote dealer, comes in and says, "You quit selling tile to these people or we are going to boycott you," which the evidence will show, Flintkote had a choice of either joining in this plan or else in letting our clients continue in business.

Now all this evidence—we have evidence here from the Downer Company that matches in with evidence we will produce later—showing exactly the exorbitant prices of acoustical tile, in other words, the incentive and purpose, the allocation of the acoustical tile bids to the members who were benefited by the scheme, and we have to introduce yet unit prices which were in vogue at the beginning of this contractors' conspiracy, again showing agreed prices to be charged by acoustical tile contractors in this area.

I think that when we get all of these in they will show identical unit prices to be charged by every contractor.

These what they call take-off sheets, your Honor, shows—and I might show you an example of one—it shows the allocation in longhand writing, which I think can be identified in nearly all cases, it shows the competitor's bid and who is supposed to get the job, and it has in red ink over [142] here signed by Mr. Arnett of the Downer Company, who is the general sales manager, it has "PTA bid," and we can prove that that was to the contractor who got the job. It happened to be Howard in this case.

Howard's records will show his bid was $5745, plus some incidentals, the Downer Company's bid

(Testimony of Walter R. Waldron.)

was ordered by Arnett to be quoted at $6228, and comparatively higher prices down the line.

The documents will show that because the evidence will show that you can't submit a bid without taking a take-off, you have to know how many square feet you put into a job, you have to figure in overhead, you have to figure in sales commission—and we would present naturally a properly filled out and regularly bona fide take-off sheet.

Mr. Black objects to that, I assume, because these defendants are no longer defendants, and I assume that were they still in the complaint his objection would probably be, well, it isn't admissible until you show that Flintkote had knowledge.

Now my answer to that is that it can be done either way, but I think it is also an equally recognized principle that Flintkote didn't have to have knowledge of any more than the fact that they were co-operating with these contractors for the purpose of eliminating my client's competition.

Now I believe that it is almost axiomatic that a co-conspirator [143] in order to be bound by the acts of the other co-conspirators doesn't need to know anything in detail about it. All he needs to know is the ultimate effect, design and purpose of an illegal act. And I think that that type of evidence——

The Court: He has to know that there was a conspiracy and what its general purpose was——

Mr. Ackerson: That is right.

The Court: ——and he needs to be in that conspiracy, and when he is then he is bound by the acts

(Testimony of Walter R. Waldron.)

of the other conspirators even if he never learns of what those specific acts were.

Mr. Ackerson: That is true. And we say the illegal act here was the urging by these other co-conspirators to put these clients of mine out of business because they didn't want that competition.

Now on the face of it, your Honor——

The Court: And it is Mr. Black's theory that the acts of persons who are not conspirators are not admissible, or the acts of conspirators are not admissible until it is shown that his client is a member of the conspiracy.

Mr. Black: That is precisely it in a nutshell, if the court please.

The Court: I think that is true, but you have the practical rule or situation here that conspiracy cases just [144] cannot be proved ordinarily by one witness.

Mr. Ackerson: Or by one line of testimony.

Mr. Black: That is also correct.

The Court: So the courts have generally said that if the plaintiff in a conspiracy case assures the court that it is going to round out by a series of witnesses that the particular matter being inquired into was being done pursuant to an established conspiracy, and is going to connect the particular defendant on trial to that conspiracy by the whole of his evidence, then court admits the evidence offered, if it be evidence, which tends to show an overt act by some one of the conspirators, and will strike the evidence at the close of the plaintiffs'

(Testimony of Walter R. Waldron.)

case, or will strike such of it as has been shown to not be the act of a conspirator, or will strike it all if it is not shown that the defendant on trial is a member of that particular specific [145] conspiracy.

Mr. Ackerson: Yes. And I assume it goes without saying that if there is an understanding on the part of the Flintkote Company that, or, at least an understanding of at least a part of the illegal activities of this original conspiracy at the time Flintkote joined, if it is shown it did join as your Honor says, I don't assume that your Honor's remarks would require my assurance they knew about every weekly meeting the contractors held or the contents of these take-off, alleged take-off sheets.

The Court: No. Your assurance is that you are prosecuting this case with a good faith feeling——

Mr. Ackerson: Yes.

The Court: ——you will link up this defendant to the conspiracy.

Mr. Ackerson: Yes.

The Court: You don't have to assure me you are going to connect or bring knowledge of every particular act to his attention.

There are a lot of times in conspiracies in which one conspirator will say that he goes along with a purpose, but he doesn't want to know certain details.

Mr. Ackerson: I have an idea that Flintkote wasn't anxious to know all these details, but they did know.

(Testimony of Walter R. Waldron.)

The Court: He might even disapprove of certain specific details, but if he gives his approval to the end object of [146] the conspiracy, then he has to accept responsibility for any detail that occurs in the furtherance of that conspiracy by any of his fellow conspirators.

Mr. Ackerson: That is my point. And I think, as a bare minimum, your Honor, I can show a general knowledge of the distribution of the end conspiracy. Whether this bid allocating scheme was in their knowledge or not, I don't think is important.

I think Flintkote can be shown to know there were only so many limited sources of supply. They obviously knew those limited sources of supply were distributed among the other co-conspirators. And I think prima facie it has been shown now, in the absence of a different explanation—something that hasn't been in the record yet—I think it is obvious right now that a prima facie case has been made of knowledge of the illegal cooperative aid they gave the contractors in cutting this client off. I think that is the least that I can assure your Honor.

The Court: What is your objection to our proceeding that way? Or do you think that I misconceive the basic law of conspiracy?

Mr. Black: No, I don't think——

The Court: Perhaps before I hear you we had better take up this ex parte matter. There is an attorney who has been sitting here since shortly after we convened, whose only business, [147] as

(Testimony of Walter R. Waldron.)

I understand it, is to move the admission of a new member of the bar of this court. We will hear that motion.

(Other court matter.)

The Court: Now, we will hear you, Mr. Black.

Mr. Black: The court please, I don't think there is any wide departure between us at all on the basic results. Your Honor is familiar, of course, with the case of Thomas v. United States, where, I think, in three sentences the court has summed up more tersely than any other place——

The Court: If it has ever been summed in three sentences I would like to hear it.

Mr. Black: It is 57 Fed. (2d) 1039. It is a most concise statement.

The Court: All right.

Mr. Black: At page 1041 the court says:

"To render evidence of the facts or declarations of an alleged conspirator admissible against an alleged co-conspirator, the existence of the conspiracy must be shown and the connection of the latter therewith established."

The second sentence is, "Declarations made by one conspirator to another are not competent evidence to establish the connection of a third person with the conspiracy.

"The existence of the conspiracy charged [148] cannot be established against an alleged conspirator by evidence of the acts or declarations of his

(Testimony of Walter R. Waldron.)

alleged co-conspirator done or made in his absence."

That, of course, is basic, in general.

The Court: It speaks as of the appraisal of the case when all the evidence is being weighed.

Mr. Black: That is correct. And I think that every case, where they have, for convenience—and I agree they have done so many times—on these very complicated antitrust cases, where they have varied the normal order of proof the court in every instance recognizes that that practice is done purely as a matter of convenience and is a departure from the normal order of proof, which is first to show your connection with the defendant before you are entitled to bring in a whole lot of evidence that other people may have done, because, as your Honor can well appreciate, that evidence might be highly prejudicial, establishing perhaps that very unfair and illegal acts are being done by a lot of other people.

The jury in some way might easily get the notion that the defendant, because he is charged with being in this, is therefore tied in to all these acts and has approved and given them his blessing.

I recognize that where you have 30 or 40 defendants, as [149] you often do in these big antitrust cases, with an innumerable number of conspirators, and particularly if it is tried to the court, that you are almost confronted with the necessity of departing from the normal procedure, first showing

(Testimony of Walter R. Waldron.)

the connection of each defendant with the thing, before the evidence is admissible against him.

Here we are dealing with a jury case. Here we are dealing with a single defendant.

The Court: But we have more than the single defendant or we don't have conspiracy.

Mr. Black: Right.

The Court: And if this conspiracy is proved, as it is alleged, we have many conspirators.

Mr. Black: That is perfectly true.

The Court: Isn't the plaintiff entitled to show the existence of a multi-party to the conspiracy?

Mr. Black: Of course, he is. But our position is that, under the normal court procedure, the rules laid down by the substantive law, and is recognized by Justice Jackson in a case I will quote you in a moment, the connection of the defendant should first be established before the evidence of the other acts come in. And to reverse that order is to prejudice or to possibly prejudice a defendant.

All we are asking in this case is that before evidence of the takeoff sheets, or whatever else he has, that the [150] other people may have done be brought in, that competent evidence first be produced to connect Flintkote Company in some way with the conspiracy.

We submit it is not enough merely to show that dealers came and complained about these plaintiffs being in the business, because that principle has been squarely decided most emphatically by the

(Testimony of Walter R. Waldron.)

case of Johnson v. Yost. That is an Eighth Circuit case. It is 117 Fed. (2d) 53. It is practically on all fours with the instant case.

The plaintiff Johnson there was a cut-rate lumber dealer. The defendants were of two classes. Other retailers in lumber, like the contractors in this case. And the second, suppliers of building materials.

The plaintiff alleged that the retail defendants had conspired together in restraint of trade to destroy plaintiffs' business by cutting off his source of supply through persuasion, coercion and threats of boycott against the supplier defendants.

The plaintiff further claimed that the supplier defendants became parties of the conspiracy by refusing to sell the plaintiff in interstate commerce.

The verdict was directed in the trial court in favor of all defendants and a judgment of dismissal of the action was entered.

The plaintiff appealed. The Court of Appeals for the [151] Eighth Circuit found that certain evidence had been improperly excluded as respects the retailers, and it reversed the trial court as to the retailer defendants, and remanded the case, but it sustained the judgment of dismissal against the suppliers, and the court in that connection says:

"In the final analysis, the claim is that these defendants were coerced by defendant dealers, and as a result of that coercion they declined to sell plaintiffs. From this plaintiffs conclude that a conspiracy existed between all of the defendants. It

(Testimony of Walter R. Waldron.)

must be borne in mind that one engaged in private enterprise may select his own customers, and in the absence of an illegal agreement, may sell or refuse to sell to a customer for good cause or for no cause whatever.

"The combination and conspiracy charged against the lumber dealers was a combination to deflect the natural course of trade. Such a combination is not only an unlawful invasion of the rights of the parties at whom the concert of action is aimed, but also of the parties who are to be coerced into refusing business relations with them. Assuming that plaintiffs were customers of the supplier defendants, the combination of the lumber dealers was directed to preventing plaintiffs from having business relations [152] with the supplier defendants. This combination prevented these defendants from selecting their own customers. The decisions of the Supreme Court abound in expressions to the effect that 'The trader or manufacturer, on the other hand, carries on an entirely private business and may sell to whom he pleases.' From the mere fact of refusing to sell to plaintiffs, there can therefore arise no inference of an unlawful agreement, because one may lawfully select his own customers * * *

"There is here no substantial evidence introduced or proffered that these defendants have gone beyond the simple refusal to sell their goods for reasons which were sufficient to them and which appeal to one as having substantial basis in reason.

(Testimony of Walter R. Waldron.)

While their acts in refusing to sell were similar, yet a fair and logical inference from the evidence is that as pressure was brought to bear on them, they from business necessity and self-interest declined to sell plaintiffs. As to some of these defendants there were other reasonable explanations, but liability on their part could only result from a knowing participation in the combination of retail dealers. It was not enough to establish a cause of action against them to show that there [153] was a conspiracy among the lumber dealers to prevent plaintiffs from securing supplies sold by this group of defendants, in the absence of evidence that these defendants knew there was such a conspiracy. They refused to sell plaintiffs because they feared such act would displease their other customers, causing loss of their business. They perhaps knew that other suppliers were refusing presumably for like reasons * * *

"So here, the refusal of the supplier defendants to sell to the plaintiffs may have furthered the object of the conspiracy charged, but it did not prove that the suppliers knew of the conspiracy."

That is precisely the position, I think, our client is in in this situation. If it is proved these people came to us and complained, and even if it is proved, which we challenge and deny, that we yielded to that pressure and not from our own business motive, that still wouldn't be enough to tie this defendant into that conspiracy.

The case I referred to on the matter of the order

(Testimony of Walter R. Waldron.)

of proof—it is Mr. Justice Jackson's statement, and the concurring statement in Krulewitch v. United States, 336 U.S. 440. 69 Supreme Court 716, where it says strictly that, "The prosecution should first establish prima facie the [154] conspiracy and identify the conspirators, after which evidence of acts and declarations of each, in the course of its execution, are admissible against all. But the order of proof of so sprawling a charge is difficult for a judge to control. As a practical matter, the accused often is confronted with a hodgepodge of acts and statements by others which he may never have authorized or intended or ever known about, but which help to persuade the jury of existence of the conspiracy itself. In other words, a conspiracy often is proved by evidence that is admissible only upon assumption that conspiracy [155] existed."

Now that is the difficulty of adopting the rule of convenience which Judge Medina has done, and very many other Federal judges have of course done. We concede that it has been done in these antitrust cases, but we submit they are done where there is a great complexity in the case and where it is obviously practically impossible as a matter of mechanics to proceed any other way.

Now all we are asking in this situation is that the connection of this defendant with the combination or unlawful conspiracy be first established before any other evidence of what other conspir-

(Testimony of Walter R. Waldron.)

ators have done or what they may have said be admitted.

The Court: Mr. Ackerson, what evidence are you going to have connecting this particular defendant with the conspiracy you have alleged?

Mr. Ackerson: May I just review briefly what is already in the record——

The Court: I wish you would just answer that question.

Mr. Ackerson: Yes, that is all I am going to do.

The Court: All right.

Mr. Ackerson: So far we have shown that the Flintkote—let me make this distinction, your Honor.

I believe Mr. Black was talking about a case where a manufacturer or manufacturers acting individually refused to sell a plaintiff. That isn't the case here. This case is [156] mere refusal to sell, this case is a case where The Flintkote Company did sell, it is admitted. They investigated. They sold. The case revolves around the thing why did they refuse to continue to sell. What is the purpose of doing that?

The Court: Is continuance of sale any different legally than starting to sell?

Mr. Ackerson: It gets back, your Honor——

Mr. Black: Mr. Ackerson, you have your facts wrong. They had been dealing with these people and they did cut them off.

Mr. Ackerson: The Johnson case, I thought I

(Testimony of Walter R. Waldron.)

heard you read, said there was no substantial evidence proffered or received.

I say this evidence here is relevant to the only defense that I understand you have, Mr. Black, and that is, what was our purpose in cutting them off. If we show it was an illegal purpose, in concert with one or more of these very contractors, that is our theory. If you can show, as you stated, that your purpose was merely independent business judgment, wholly disassociated from any pressure or knowledge of your contractors' acts, that is another thing.

But I say, and I believe the cases bear me out, your Honor, that you can always introduce evidence as to purpose and design.

The Court: Are you contending that the yielding to [157] pressure makes the one who yields a party to the conspiracy?

Mr. Ackerson: If he knows the illegal design and if I can prove it.

The Court: And is that going to be your evidence of connection of this defendant to the conspiracy?

Mr. Ackerson: Yes, that plus other knowledge, your Honor, that they knew the design.

The Court: What other knowledge are you going to bring home to this particular defendant? And is that going to be your evidence of connection of this defendant to the conspiracy? [158]

Mr. Ackerson: Yes. That plus other knowledge, your Honor, that they knew the design.

(Testimony of Walter R. Waldron.)

The Court: What other knowledge are you going to bring home to this particular defendant?

Mr. Ackerson: Well, this defendant, the knowledge that I have already stated, that this defendant knew the setup, he knew the effect of the setup, and when he was asked to help and obeyed and, I say, joined the setup by eliminating the only competition in the field, unless he can show that he didn't know anything about it, that he wasn't helping these contractors at all, it is my theory that he joined the conspiracy.

The Court: The court finds that the complexities of the case now on trial are such, the involvement of the alleged parties to the alleged conspiracy is such, that it is necessary to invoke the rule of convenience, as you have referred to it, Mr. Black, and to allow the evidence of acts and declarations of other alleged conspirators to be admitted into evidence, subject to a motion to strike.

I do not know just what the outcome will be when a motion is made to dismiss at the conclusion of the plaintiffs' case, which I assume will be, on the question of joining a conspiracy because of compulsion, if the compulsion is shown to be in the form of pressure from the Association, pressure from other vendors. That would be evidence, I take it, [159] circumstantial evidence, or offered as circumstantial evidence, of the joining of a conspiracy, but you are going to have to have enough, Mr. Ackerson, that the resonable inference to be drawn from all the facts is that it was a yielding to the

(Testimony of Walter R. Waldron.)

combine and becoming a member of it, otherwise we will have to, in the language of the street, throw your case out.

Mr. Ackerson: I realize that.

The Court: But for the present we will follow the rule of convenience and admit the testimony.

Now I haven't heard anything yet which would indicate a court's duty to depart from the rule that admissions of a conspirator, one conspirator made in the course of a conspiracy and in furtherance of it, are admissible against and binding upon the fellow-conspirators. The rule I refer to is the one that holds that in order to be in furtherance of a conspiracy, the act or declaration must be one which was made in the course of the conspiracy and not afterwards. I think that the date of the conspiracy ended as the closing date for the making of admissible admissions binding on other conspirators—it is certainly binding upon the person who makes them—but as to their being in furtherance of a conspiracy they can't very well further it after it is ended. And I think if your February 19, 1952, date of ending is the date which forecloses the admissions of persons other than the firm on trial and its own direct agents acting for it rather than acting [160] for it as a conspirator——

Mr. Ackerson: Very well, your Honor.

The Court: ——so if you have some holding of a court on that express question, I will reopen the ruling, but unless you do have, I will not admit testimony of the type just alluded to.

(Testimony of Walter R. Waldron.)

Mr. Ackerson: Statements or acts subsequent to the termination date of the conspiracy, February 19th?

The Court: Yes. That statements or acts of persons other than the defendant on trial, and its agents, that is, the agents of Flintkote, Flintkote a corporation rather than Flintkote a conspiracy.

Mr. Ackerson: Yes.

The Court: Because every conspirator is an agent of the other conspirators for the purpose of furthering the conspiracy. They even apply that in criminal law so far that if you and I were to conspire to rob the reporter here, and we say we will perhaps rough him up a little but no firearms, and then I get improvident and take a gun and shoot him, and that being in furtherance of the conspiracy to get his wallet, they will hang you for it.

Mr. Ackerson: I realize that.

I think our Ninth Circuit decisions, probably those old bootleg cases, went further along that line of joining a conspiracy, responsibility for the conspiracy, than most other [161] cases did. I know I read many, many of them before.

The Court: The various treatments of sale of alcohol at times when it was prohibited as a beverage have led to a modification of conspiracy laws and criminal laws throughout the nation and the state generally.

I found in connection with an entirely different type of case than in connection with the Volstead Act, that no state would prosecute a person for

(Testimony of Walter R. Waldron.)

the exact state of facts that the federal government prosecuted for, because they felt that the rule against double jeopardy prohibited it.

Then New York had a state prohibition law similar to that of the nation and they took to prosecuting people, waiting for them with the sheriff as they were released from a federal institution, prosecuting them all over again for the same pint of whiskey, or possession of it.

Someone who had more than a pint carried the matter up to the Supreme Court and the Supreme Court said that that is not double jeopardy because you are being prosecuted by an entirely different entity than the United States, you are being prosecuted by an individual state, and so the doctrine prohibiting double jeopardy, at least in its common concept of the people, and I am reasonably sure of those who wrote it into the Constitution, was stultified. But the legislature of New York was shocked by it and they threw out their prohibition law, so for many years there was no prohibition [162] law in New York although the Volstead Act stayed on the books.

But that is not our case. It is just an aside from the issues of our case, but I simply mention it because you made some reference to the liquor laws as having brought forth a considerable modification of the laws of conspiracy. I agree. I think it was a modification of every law.

Mr. Ackerson: I have often thought that the

(Testimony of Walter R. Waldron.)

federal fraud statutes are sort of a form of double jeopardy. They can indict you for conspiracy and ten substantive counts for every overt act that they took into the conspiracy. I don't know whether that was intended when it was passed or not, but I guess it was because they revised it fairly recently.

The Court: I think we ought to take a little recess for court and counsel.

Mr. Black: There is one other point, if the court please, that I think is very briefly stated, and that point of difference has arisen in connection with some of this damage testimony.

It is our position that the law is just settled beyond peradventure that in the treble damage cases, damage only up to the time of the filing of the complaint is recoverable.

The Court: Is there any contention otherwise?

Mr. Black: I don't know, but I think there is.

Mr. Ackerson: Yes. I would like to submit a memorandum on that, on certain types of [163] damages.

The Court: Don't you have to file a supplemental complaint?

Mr. Ackerson: That is a simpler way to do it, but I don't think you have to.

Mr. Black: You must indeed because the cases hold that in order to get damages beyond the time of the filing of the complaint treble, you have to show that the conspiracy continued and that every other element in the case continued.

The Court: Can they get them once on the orig-

(Testimony of Walter R. Waldron.)

inal complaint? Can they get damages up to the time of trial?

Mr. Black: Up to the time of trial.

The Court: But not treble?

Mr. Black: No.

The Court: That is one matter I would appreciate having a memorandum on.

Mr. Black: Very well. We will brief that point.

The Court: I think that would be better than to go ahead with the whole trial brief.

Mr. Ackerson: I will do that over the week end, and I am sure Mr. Black will also.

The Court: Let us recess for about 10 or 15 minutes.

(Short recess.) [164]

(Whereupon, the following proceedings were had in the presence and hearing of the jury:)

The Court: Members of the jury, we disposed of the particular legal issues. There is no need now to tell you about them. But it might be well, as it is in the course of a case which is not of the every-day variety, to point out to you a couple of the rules of law in connection with it, although you will be fully instructed at the close of the case, and that is the time when the instructions generally are given.

It is the law that a manufacturer can select whom he wants to sell to. You go down the street to one of the restaurants in town and go in. They come under the law of innkeepers and have to serve you.

You go up to the Santa Fe and ask to buy a ticket to Chicago. They have got to serve you because they are common carriers.

You go to Flintkote Corporation and say, "I want to buy some tile."

They can say, "I don't like the way you comb your hair. I won't sell it to you," and they are entirely within their rights.

What these antitrust laws prohibit is a conspiracy in restraint of trade. That is what is on trial here. Unless these plaintiffs can show there was a combination and [165] conspiracy which damaged the plaintiffs, and the conspiracy was a particular type which will be described in the instructions at the conclusion of the case, then you will have to find for the defendant.

If you find the plaintiffs were injured, damaged in a money way by the conspiracy, then it goes otherwise.

Now, a conspiracy, generally speaking, is a combination of two or more persons or corporations for the purpose of accomplishing an illegal act or for the purpose of accomplishing a legal act in an unlawful way.

Conspiracy arises from an agreement, but it is not the agreement itself. Marriage arises from an agreement, but it is not the agreement itself.

The conspiracy is the combination which arises from the agreement, and the agreement can be informal or it may be formal. It can be implied from acts, circumstances, if they are clear and definite and compel that conclusion, or they might sit down

and write it up. But if it is an illegal purpose which is sought to be accomplished, it is very unlikely it would be written up, anyway.

Now, Counsel, does that statement——

Mr. Black: I think something should be said about the necessity of showing that the defendant in some way was connected with it.

The Court: Yes. We are, of course, not giving the full [166] instructions at this time, but these little interim comments I have found to be useful in cases of this kind and generally are given by the members of the court.

Now, a conspiracy is only important here if this defendant be shown to be one of the conspirators. There might be a conspiracy which does no end of damage to a particular individual, but it is the members of that conspiracy who are responsible to it, and not persons or firms that are not in the conspiracy.

If this defendant, acting individually for its own purposes, regardless of whether they were laudable or not, decided not to sell to the plaintiffs, then the plaintiffs just have to live with that fact, unless they have a contract. The plaintiffs aren't suing here for breach of contract.

So it is going to be necessary for the plaintiffs, either by direct or circumstantial evidence, to establish evidence which establishes, by a preponderance of the evidence, that the defendant on trial, The Flintkote Corporation, was a member of a conspiracy and that the conspiracy was the type that is

charged in the Complaint, and that these plaintiffs suffered damages as a result.

Now, have I stated only as to one side of the [167] coin?

Mr. Ackerson: I am satisfied, your Honor.

Mr. Black: That is satisfactory, your Honor.

The Court: Proceed with the evidence.

WALTER R. WALDRON

having been heretofore duly sworn, resumed the stand and testified further as follows:

Direct Examination
(Continued)

By Mr. Ackerson:

Q. Mr. Waldron—first, may I have this marked for identification?

The Clerk: Plaintiffs' Exhibit 16 for identification.

(The exhibit referred to was marked Plaintiffs' Exhibit No. 16 for identification.)

(Exhibiting document to counsel.)

Q. (By Mr. Ackerson): Mr. Waldron, I show you Plaintiffs' Exhibit 16 for identification and ask you if you can identify that document.

A. Yes. That is a financial statement brought up for the first six months of our operation in 1952.

Q. Does that financial statement involve this one carload of acoustical tile which you got from Flintkote? A. Yes, that is it completely.

(Testimony of Walter R. Waldron.)

Q. Does it involve any other matters that you can see at this time? [168]

A. No, this is just the results of that.

Q. Of that carload of acoustical tile?

A. Yes.

Mr. Ackerson: I will offer it.

The Court: Received.

(The document referred to was received in evidence and marked as Plaintiffs' Exhibit No. 16.)

Q. (By Mr. Ackerson): Mr. Waldron, did you ever attend a meeting of these acoustical tile contractors in this area? A. Yes.

Q. When was that? A. That was in 1950.

Q. Who were you employed by at that time, Mr. Waldron? A. Coast Insulating Products.

Q. Did you attend that meeting as a representative of Coast? A. Yes, in a sales capacity.

Q. Who told you to attend the meeting, if you were told?

A. Yes, I was asked to attend by Mr. Newport, an owner of the firm.

Q. And can you state where that meeting was held?

A. Yes, that was held at Rodger Young—I think they called it Auditorium—however, it is a cafe, on Washington [169] Street, I believe, in Los Angeles.

Q. I wonder if you can describe what happened there and by that I mean what was said and what was done.

(Testimony of Walter R. Waldron.)

A. Well, the reason for the meeting was to clarify the use of quantity survey service that was headed by—I can't remember the man's name at the moment.

Q. Was it Mr. Hollenbeck, or some such name?

A. Mr. Hollenbeck, that is correct.

Q. Can you explain what a quantity survey is?

A. Yes. The acoustical contractors at that time were submitting their estimates of any one job to this individual for quantity survey, in other words, the amount of square footage that was to be on any one job as a take-off, as each contractor saw it. Now the ruling there was——

Q. Let me get this straight in my own mind, Mr. Waldron. Where did the quantity survey come in? Was that these take-off sheets?

A. Yes. Those are take-off estimates of a blueprint.

Q. And what did Mr. Hollenbeck do with them? Were they submitted to him?

A. Yes, he received them by mail and delivery and they were opened in his office without any of the contractors present, and it was his duty to decide who had the least amount of acoustical tile on a job and——

Q. On a job or on a bid? [170]

A. Well, in this case, it was the job represented there by the take-off. This was not a bid. The bid would be handled by the contractors themselves after this survey was taken place.

(Testimony of Walter R. Waldron.)

Q. Let me interrupt you again. I don't know whether I am following you.

These various contractors, I take it, would take a take-off sheet, the amount of material they felt would be needed to install the acoustical tile, for instance, in this room—— A. That is correct.

Q. ——and then that take-off sheet would be submitted to Mr. Hollenbeck? A. Yes.

Q. What for, checking, or what? Did he check for accuracy or what? I don't understand what Mr. Hollenbeck did yet.

A. In principle, it was inaccuracy. However, he was to decide the low man, or the least amount of acoustical tile that showed on their take-offs. Am I clear there?

Q. In other words, he would decide which contractor had submitted the take-off sheet requiring the least amount of tile to go into the job, is that it?

A. Yes, And he in turn was instructed that that man would be dropped from the bidding list and the next man in line would be instructed to take the job. [171]

Q. Now, the——

Mr. Black: If the court please, may it be understood that all of this testimony is subject to our motion to strike, or would the court prefer that we object to each question at the time? I want to keep our record straight.

The Court: I understand that testimony of this type is subject to a motion to strike.

(Testimony of Walter R. Waldron.)

Mr. Ackerson: I think that is the only convenient way to do it, your Honor.

Q. Now, at this meeting at the address you gave, can you tell us what happened when you came in, how it proceeded? A. Yes.

Q. And how it broke up?

A. Yes. That was a dinner in the early evening and after dinner there was discussion on methods of approach to a set of plans.

Q. What kind of a set of plans?

A. Construction, architectural portion of the work, architectural acoustics.

Q. Was that in the nature of how to make a proper take-off?

A. That is right, to try to be a little more accurate in take-off methods.

Q. Was that a general discussion or did someone lead it? [172]

A. It was led by Howard Smith of the Schugart Company. He was leading the take-off methods at the moment.

However, there were questions of how this price, maximum price list, would prevail there, and there were comments made——

Q. I haven't asked about a maximum price list, Mr. Waldron. I realize you are trying to answer the prior question.

I will interrupt you and ask to have this marked as Plaintiffs' Exhibit next in order.

The Clerk: Plaintiff's Exhibit 17 for identification.

(Testimony of Walter R. Waldron.)

(The document referred to was marked as Plaintiffs' Exhibit No. 17 for identification.)

Q. (By Mr. Ackerson): Now I show you Plaintiffs' Exhibit 17 for identification, Mr. Waldron, and ask you if that is the price list, or if that is the type of price list you mentioned in your testimony.

A. Yes, this is a type of one that was used during a period there. I didn't have this particular one at that time.

Q. Did the list change, I mean you knew about Coast Insulating at that time, I suppose?

A. Yes.

Q. Did Coast Insulating change from time to time thereafter? [173]

A. No, they held onto that for some time, and then the acoustical contractors organization was set up and the minimum price list was dropped and then allocation through meetings was arranged.

Q. But this same price list, the same prices, is it your recollection that they continued on until the formation of the Acoustical Association?

A. Yes, they tried to hold to that particular type of minimum bid.

Mr. Black: That is objected to as a conclusion of the witness.

The Court: They tried to hold to that is a conclusion of the witness and it is stricken.

Whenever any evidence is stricken, the jury should disregard it.

Q. (By Mr. Ackerson): Can you state whether or not the prices listed on this Plaintiff's Exhibit 17

(Testimony of Walter R. Waldron.)

for identification were adhered during the period from this meeting in 1950 up until the Acoustical Contractors Association was organized formally?

A. This particular type was. I use one. I see this one was revised July, 1951, and to cancel all previous ones, but I had one myself, and the prices appear to be pretty close if not the same as the one I used at this meeting in 1950. [174]

Mr. Ackerson: Very well. I will identify this at later date, Mr. Black.

The Court: Should it not be given a number for identification?

Mr. Ackerson: It has a number; it is No. 17, your Honor.

A Juror: May I ask a question?

The Court: Yes.

A Juror: This room was given as an example. Do I understand that would give the take-off that each man should give the amount of footage that would be required to be used in this given room, and are they encouraging that the one that gives the lowest amount of footage will not be accepted? In other words, to encourage the contractors to figure more on a job?

The Witness: Am I to answer that?

The Court: Unless there is an objection, you can answer it.

The Witness: That is correct.

Q. (By Mr. Ackerson): Now did you attend any other meetings other than this one, Mr. Waldron? A. No, I didn't attend any more.

(Testimony of Walter R. Waldron.)

Q. Do you know of your own knowledge whether anyone else connected with Coast—that was the firm you were working for at that time? [175]

A. Yes.

Q. Do you know of your own knowledge—I don't mean by hearsay or rumor—whether or not any other representative of Coast attended other meetings? A. Not that I could be sure of.

Q. When did you start working for the Downer Company? A. In the fall of 1950.

Q. The fall of 1950? A. Yes.

Q. And this meeting occurred how much prior to that time?

A. Oh, I am guessing, but I think two or three months.

Q. Now do you have a typical form of take-off sheet that has been completed in your possession?

A. I believe I have in the briefcase over there on the bench.

Q. Can you take out just one, or whatever you need for illustration?

A. Well, any of these, I suppose. These are not large but I think any of them would give you an idea of what is necessary there.

Q. In other words, the only difference would be ordinarily that one would require more materials than others and this happens to be one requiring a small amount?

A. I wonder if you would tell me what date that was in [176] the right-hand corner.

Q. 12/17.

(Testimony of Walter R. Waldron.)

A. That is all right. I won't need that.

Mr. Ackerson: May I have this marked for identification, Mr. Clerk?

The Clerk: Plaintiff's Exhibit 18 for identification.

(The document referred to was marked Plaintiff's Exhibit No. 18 for identification.)

Q. (By Mr. Ackerson): Now you can identify this then as a typical form of take-off sheet that has been filled out and contains the usual data of the take-off sheet in the acoustical tile?

A. Yes, that is complete. It has all of the acoustical tile and the component materials necessary to attach this tile in position, and it has the labor and trucking and tax on materials, and insurance on labor, and then a cost price, a mark-up price, and a bid price. [177-178]

Mr. Ackerson: I would like to offer that at this time. I think you have seen this, Mr. Black.

I will offer this at this time. This is the Plaintiffs' Exhibit 18 for identification.

Mr. Black: We will object to it, subject to our motion to strike as part of the general——

The Court: Received in evidence.

(The document heretofore marked Plaintiffs' Exhibit No. 18 for identification was received in evidence.)

Mr. Ackerson: I wonder if we can staple these on the corner and have them marked for identification under one exhibit number.

(Testimony of Walter R. Waldron.)

The Clerk: Plaintiffs' 19 for identification.

(The documents referred to were jointly marked Plaintiff's Exhibit No. 19 for identification.)

Q. (By Mr. Ackerson): Mr. Waldron, I show you Plaintiffs' 19 for identification and ask you if you can identify these various sheets under that exhibit? I mean identify them.

A. Yes, I recognize the sheets.

Q. Will you state what they are?

A. They are sheets similar to the one the jury has at the moment. However, in the absence of specification and absence of takeoff of room and sizes and thickness of material and the final tally or addition of quantity that [179] would be on this particular job—I see that is a job of A. Sutter Elementary School, Long Beach—and on the back there is an absence of acoustical tile component materials necessary to install acoustical tile, and absence of tax, warehouse costs, cartage, labor, supervision, insurance on labor, or any cost figure or any mark-up figure, other than the one you find at the bottom here, which gives one figure, which over here (indicating) there is an "H" that will—you can identify it. I can later.

Q. Yes. In other words, your statement is there is no date upon this upon which to work up a bid, is that the general gist of your statement?

A. Yes. These figures on the left are of a certain amount, and on the right there is a higher figure that

(Testimony of Walter R. Waldron.)

is written here to "O.K.," signed "R. W. A." which means this is the figure which we had to quote in bidding (indicating) this job, without knowing what we were working on at the beginning of the situation. And later find out, by asking the general contractor that got the job, and find out this figure took the contract (indicating), you see, the lower figure.

Q. I am going into that, Mr. Waldron.

Can you explain where these documents came from?

A. Yes, they came from my briefcase. They are pads that we have to make takeoffs with. [180]

However, in this blank takeoff sheet, I was handed numerous of these things, and was asked why we lost the job and to find out why we lost the job.

That is the general procedure of a general—sales manager, to learn why we lose work in any company.

Q. Were these sheets handed to you by the general sales manager or some member of the staff of Downer?

A. Yes, there were times when Mr. Arnett, this company handed me one or two or three, and then, of course, it was instructions to—his secretary, to see, in his absence, that we would learn why we lost these jobs.

Q. Well, what was ordinarily done with these sheets, Mr. Waldron, when you found out you had lost the job? Were these kept in the files of the company or were you supposed to keep them?

(Testimony of Walter R. Waldron.)

A. No, I kept all of mine. I still do. And although there are times when one of these will come to life again, someone either can't perform or doesn't have time, and there are occasions even in this school bidding—it is very rare, but once in a while something happens and we get another shot at it, so to speak.

Q. How long did you ordinarily, as a personal matter, keep these files after you found that you had lost the job or that Downer Company had lost the job?

A. Well, months, I would say, since a job doesn't go [181] in for six or eight months, on a large job three to eight months and sometimes ten months or a year. So I would keep them, and those I just left in my briefcase after I learned that we weren't in the money on that particular piece of work.

Q. Did you ever return them? You carried most of your equipment of this sort around with you on the job, didn't you, when you were soliciting?

A. Oh, yes.

Q. Did you ordinarily return these documents after you found Downer had lost the job for any official filing with Downer Company? Was that the practice or not? A. No.

Q. In other words, the files that Downer Company had, under a regular filing system with those jobs, in which they were successful in, is that right?

A. Yes.

Q. Now, I would like to call your attention to the longhand writing on the first sheet here relating to

(Testimony of Walter R. Waldron.)

the Sutter School, and ask you if you can identify either of those writings or if there are two writings.

A. I don't know. I identify this as being the initials——

Mr. Black: I am sorry, I didn't hear the answer.

The Witness: Identify the writing as being the initials of Robert Arnett, sales manager of the R. W. Downer Company [182] at that time.

Q. (By Mr. Ackerson): And you are referring to the writing within the red circle and in red print?

A. Yes, these are not—I wouldn't know if these were his figures (indicating), but this is his "R. W. A." initials. I have seen them many times.

Q. What about the "O.K." above the initials?

A. That is right, the "O.K., R. W. A." was in that circle.

Q. Now, I notice some figures in that circle. The figure "$6,228.00, $2,532.00, $1,210.00, $387.00."

Can you tell me what they are? What is the significance of those figures, do you know?

A. That is a carryover of percentage higher than the grouping on the left (indicating), and this is $6,228.00, the top one (indicating).

Consequently these are dollars and they are over the other figures, and the other is $5,745.00; that took the job. We quoted $6,228.00. I say "we." I have—I may have done the phoning myself.

There are times at the last minute—I want to explain one other thing, if I may. On school bids, public works bids, the subcontractors seem to wait—and it is a general practice—until the last hour before

(Testimony of Walter R. Waldron.)

bid time, and then as many as two or three or four people in our office [183] would choose about three or four contractors each, and in some events there are 10 or 12 general contractors bidding on one job, and they throw their bids in right fast at the last minute, so there is no chance, as we feel, of someone picking up our bid at a friendly place and resubmitting it. In other words, they won't have time.

Q. Now, can you explain in any manner how you would arrive at that figure of $6,228.00 and the subsequent figures?

A. I don't know how we arrived at the figure on the left. I can't see any reason that you could ever arrive at any figure there.

Q. You are talking about $5,745.00 and the figures under that column? A. Yes.

Q. Is there any indication on this sheet, Mr. Waldron, of any basis for those figures?

A. Well, they are in sequence. This job, the person who got this job for this amount of money, that we knew about before bid time, which was listed here at 2:00 p.m., April 26, '51.

This bid had to be in to the general, or, the general contractor had to have his bid in by 2:00 o'clock on that day, and all of his subcontractors would have to have their bids in sometime prior, to allow the general to work it up [184] and go on his way and be at this bid opening.

Now, each time we bid a job like this and each time it was before the bid opening, and each time

(Testimony of Walter R. Waldron.)

there is an initial at the upper right-hand corner, and in this case it is "H."

Q. What does "H" mean there, if you know?

A. Well, we learned later, after checking, that this figure was submitted (indicating), and the low bid was the R. E. Howard Company. And after we learned that, this was written down here, who got the job (indicating).

This "H," as the sequence shows through all those things, that the "H" at the top would be Howard and "C" would be Coast, and "Sh" would be Shugart. And there is Denton and their initials are all up there (indicating). Those are there before we ever bid the job.

Q. Do you know who placed them there?

A. Someone in the office of the R. W. Downer Company did these. Now, I don't know just who. I don't recognize the "H."

Q. When they were given to you, they were in this same form, just as we have them here?

A. Yes, and I would ask for the takeoff and they would say, "That is all we have. There is no takeoff."

Q. You would proceed or Downer would proceed to enter the red figures in the red circle? [185]

A. Yes.

Q. Do you have any basis for stating that the pencil figures opposite the red figures were received by Downer Company prior to the actual bid by Downer Company?

A. Yes, that is correct. Their estimating, the

(Testimony of Walter R. Waldron.)

office estimator there, who would check our figures from time to time, or in some cases work up a job himself complete—I believe those are his [186] figures.

Q. Do you know who that was?

A. Mr. Griswold, who has since deceased.

Q. Did anyone else supply figures—do you want to turn over some of the rest of these and see if they all have the same type of handwriting on them or whether you can identify other handwriting?

A. Here is one that I believe is R. W. Arnett.

Q. You are referring to——

A. I don't know which one it is.

Q. The sheet relating to——

A. Well, I don't know which one. These are all attached together. I don't know if this sheet or this one, probably this one is the one.

Q. It is attached to either the sheet relating to the——

A. John Muir Junior High School. That is in Burbank.

Q. Or to the following sheet?

A. Yes. It is a portion of Transit Shed, Long Beach Harbor. That would be the Harbor Commission job. I don't know which one it is. It says John Muir job here. This may be the other one, you see, or a different John Muir. There were several.

Q. Very well. Pass on to the next one then and see if you can identify either the writing on the back of it——

A. This would be, although it isn't initialed, it

(Testimony of Walter R. Waldron.)

would [187] be Mr. Arnett because of the word "quote" which is similar to the one we just looked at.

Q. And by "here" you are referring to the red writing?

A. Yes, there was a condition on this type—this is Howard's; you have all of Howard's—there are several others there, but they called in a figure to our company of a certain amount here and later changed it and raised it, and that is why this one is marked out and a higher figure put just above, that is why this is marked out and a higher figure over here in the mark-up over his figure to assure him of no foul-up, so he would be sure and get the job.

Q. By "he" you mean Howard, I take it?

A. Yes, in this case it is Howard, R. E. Howard, acoustical contractor.

Q. And that with reference to the Long Beach job——

A. Yes, that is a transit shed, Long Beach Harbor.

Q. Now let us pass over to the following one. Would your testimony be the same as to that?

A. Yes, this is the one that had an exact amount to raise it, they were instructed to raise it, or our company was instructed to raise it 9 per cent, which apparently would be roughly that figure.

Q. The difference between $880 and——

Mr. Black: Just one moment, please.

You say your company was instructed. By whom and was [188] that in your presence?

(Testimony of Walter R. Waldron.)

The Witness: This company, Mr. Black, was instructed by—what figure was that?—by the Howard Company, the R. E. Howard Company——

Mr. Black: How do you know that? Were you there?

The Witness: There have been occasions when I was there and Mr. Griswold would be talking to them and I was just looking right there, sitting near him, and on one occasion, the occasion I am referring to, he had to call back because when we bid the job, or Griswold bid the job, he found out that he was low, so he had to really call back and check, and revise his figures, so he wouldn't be below the Howard figure.

There is so much of it that I can't—I don't know—should I take detailed time to go into all of this?

Mr. Ackerson: Mr. Black, you are asking him.

Mr. Black: I was simply suggesting that you answer from your own personal knowledge rather than your impression of things.

The Witness: Yes, I have been there on many occasions and I would scratch my head and wonder why we were doing that sort of thing.

Q. (By Mr. Ackerson): In other words, you had personal knowledge eventually of the system——

A. Oh, yes. [189]

Q. ——that was being used?

A. Yes, because I was losing money. I only lived on commissions at that time, and any time they gave a job away my commissions went out the window.

Q. Now you have noted, have you not, that there

(Testimony of Walter R. Waldron.)

is absolutely no specifications, and so forth, amounts, sales tax, warehousing, cartage or anything on these pages? A. Yes.

Q. Now would your testimony be the same with respect to the writing, and so forth, on this one?

A. Yes.

Q. Let me take the next page in order.

A. Yes, that is correct.

Q. And the next page in order?

A. That is correct.

Q. And the next page? A. Yes.

Q. And the final page? A. That is right.

Mr. Ackerson: I will offer this, your Honor.

Mr. Black: That is of course objected to, your Honor, on the same grounds stated this morning.

The Court: It will be received.

(The document referred to was received in evidence and marked Plaintiffs' Exhibit No. 19.) [190]

The Court: By "the same grounds stated this morning," you mean the grounds we discussed during the jury recess?

Mr. Black: Yes, your Honor.

The Court: Thank you.

Mr. Ackerson: I will pass this to the jury.

(Passing exhibit to the jury.)

Mr. Ackerson: May I have these three sheets marked next in order?

(Testimony of Walter R. Waldron.)

The Clerk: Plaintiffs' Exhibit 20 for identification.

Mr. Black: Mr. Ackerson, the fact that we objected to these things perhaps still doesn't disqualify us from looking at them.

Mr. Ackerson: I know Mr. Doty has had them.

Mr. Black: We didn't know which ones they were.

Mr. Ackerson: I didn't mean to be negligent on that.

(Exhibiting documents to counsel.)

Q. (By Mr. Ackerson): Mr. Waldron, I thought I had all of the Howard data in the prior exhibit. Can you state whether or not these additional three sheets, marked Plaintiffs' Exhibit 20 for identification, are likewise Howard sheets?

A. Yes, sir. Those were in the same manner and these, as I say, these initials or awarding initials, were there prior to bid date.

Q. You are referring to the upper right-hand corner? [191] A. Yes.

Q. When you say "these initials"?

A. Yes.

Q. And you notice the handwriting and the figures?

A. Yes. This was a 7 per cent markup here.

Now the reason why there is a difference in 7 and 9 on the last one, and so forth, it was so arranged that no two competing bids that were to be put in would be of the same price on the supposedly com-

(Testimony of Walter R. Waldron.)

peting bids. They would vary enough so that it would look real natural.

Q. In other words, the mark-up on the low bids was not always 9 or always 7?

A. No, it was 6 and 4 and 2 and various ways.

Q. And your statement would be the same with respect to the third sheet? A. Yes.

Mr. Ackerson: I will offer this Plaintiffs' Exhibit 20 in evidence.

(The document referred to was received in evidence and marked Plaintiffs' Exhibit No. 20.)

Mr. Black: Same objection, if the court please.

The Court: It being 12:00 o'clock, we will take the noon recess. Will it inconvenience anyone if we convene at a quarter of 2:00 instead of 2:00 o'clock?

Mr. Ackerson: After last night, your Honor, and the [192] courtesy of court and counsel, any time will suit me.

The Court: The adjournment will be until 1:45 today.

(Whereupon, at 12:00 o'clock noon, a recess was taken until 1:45 o'clock p.m. of the same date.) [193]

Friday, May 6, 1955—1:45 P.M.

The Court: You may proceed.

Mr. Ackerson: Thank you, your Honor.

WALTER R. WALDRON

called as a witness on behalf of the plaintiffs, having been previously duly sworn, resumed the stand and testified further as follows:

Direct Examination
(Continued)

Mr. Ackerson: Mr. Clerk, may I have this marked Plaintiffs' Exhibit for identification next in order?

The Clerk: Plaintiff's Exhibit 21 for identification.

(The document referred to was marked Plaintiffs' Exhibit 21 for identification.)

Q. (By Mr. Ackerson): Mr. Waldron, I show you Plaintiffs' Exhibit 21 for identification, and ask you if you can identify these sheets as sheets similar to those contained in the immediately preceding plaintiffs' exhibits.

A. Yes, they are similar.

Q. Do you note any differences on any of them?

A. Yes, there is one that was my work in making up what we call a takeoff from a set of plans.

Q. Does the difference arise in that it has a takeoff formula and data in the sheet?

A. Yes. This is the only way we were able to arrive at a cost or bid price, by having all items in this job, that [194] is, under our work, put down and extended and totaled and estimated piece by piece.

Q. Now, you are referring to the fourth sheet on this exhibit for identification, are you not?

(Testimony of Walter R. Waldron.)

A. Yes.

Q. There being three sheets ahead of it?

A. Yes.

Q. Now, will you explain what distinction there is between that sheet and the previous sheets we have been talking about?

A. The difference is this has a complete job on it and can be totaled and arrived at as a cost to accompany a material cost, labor and trucking and other component operations, to complete a job.

Q. Did you take that information yourself? Is that your own work?

A. That is my work, yes.

Q. Well now, were you working for Downer at that time? A. Yes.

Q. Did the Downer Company get that contract?

A. Yes, I would give it to Mr. Griswold and he, in turn, would extend all these items.

Q. I think you misunderstood my question. Did the Downer Company, were they successful in their bid on that particular job? [195]

A. Oh, no, they didn't try to get this job, as this sheet will show, because it was never tallied and no cost workup was ever put onto it.

Q. Are there any other substantiating or unusual markings or procedure on that particular fourth sheet you are talking about?

A. I find on the back the word "SO," or, the letters "SO," which through these sheets in sequence have so far been allotted to The Sound Control Company.

(Testimony of Walter R. Waldron.)

And I have here note paper written in what I believe is the handwriting of Mr. Arnett of the R. W. Downer Company and certain prices here. And then certain percentage marked up above that price. And then on the other side there is a typewritten quotation sheet which we have when we bid over the telephone. These are allocated by telephone.

Q. Is the price, or, does the price on that quotation sheet correspond with the markup, with the marked-up price or the lower price on the other side of the paper?

A. No, the sheet for quotation is of the higher figure.

Q. That was the Downer quotation?

A. Yes.

Q. You did not get that job?

A. No, we didn't.

Q. Now, otherwise referring to the other sheets in [196] this exhibit for identification, do you find any other distinctions or differences that were not found in the previous exhibits?

A. Well, yes, in this one (indicating).

Q. You are referring to the first sheet?

A. That is the first one. There is no takeoff effort at all or specification effort, and there is no workup of materials, labors, and et cetera.

Q. Now, I note there is a scratch pad sheet with some handwriting on it stapled to the inside of the first sheet. Can you explain any significance of that?

A. That again, I believe again is Mr. Arnett's handwriting, and he jotted this down, and then in

(Testimony of Walter R. Waldron.)

turn put a greater price on the sheet for [197] bidding.

Q. You mean on the Downer bid?

A. On the Downer bid, and the Downer bid was quoted at a larger figure, and this job was taken by Shugart & Company.

Q. Well, now, we have covered 1 and 4. Do you note any similar material on No. 2?

A. No. 2 is like No. 1, it is blank on both sides, there is no specifications nor materials of take-off of room sizes, elevations, or sections, and again there appears the name of Shugart here in Mr. Arnett's —I am going to say this is Mr. Arnett's—handwriting, and it says that Shugart's face bid is this, so much money here, and then the bid we quoted at that time was a certain percentage higher, as you can note.

Q. You are referring to sheet 2? A. Yes.

Q. Do you find similar information on sheet 3?

A. On sheet 3 it is similar to sheet 2, in that it has hand written notation which is also, I will say, in the handwriting of Mr. Arnett, and at the top where there is a "H" and a portion, I will say, of an "O." and the rest has been torn away, that over here we have the "H. O." under the "L5," at the time they decided to use numbers instead of initials, and a larger quote for the Downer Company than is listed here on this note paper. [198]

Q. In the longhand writing of Mr. Arnett, is that right?

Mr. Black: Pardon me, if the court please. That

(Testimony of Walter R. Waldron.)

last one was testimony by counsel, I think. We will have to object to it on the ground it is leading.

Mr. Ackerson: He had previously testified that that was Mr. Arnett's writing.

The Court: Let us square it up. Do you know whose handwriting it is?

The Witness: Yes.

The Court: Whose handwriting is that?

The Witness: Mr. Arnett's handwriting.

The Court: Are you familiar with that handwriting?

The Witness: Yes, I worked with him a year and a half or so.

The Court: Did you see him sign this or are you identifying it from your familiarity with the handwriting and occupation of this particular writer?

The Witness: There were times when he would bring this out and make notes on my desk for bidding purposes, and I am comparing his handwriting with his initials that are oftentimes under it, and I believe I am right in that it is his handwriting.

Q. (By Mr. Ackerson): You are acquainted or were acquainted for over a [199] year or more time with Mr. Arnett's handwriting? A. Yes.

The Court: Is that sufficient, Mr. Black?

Mr. Black: It is a little bit hazy.

Have you ever seen him write?

The Witness: Oh, yes, many times.

Mr. Black: And you state you believe this is his handwriting, but do you recall that particular document as bringing it out to you?

(Testimony of Walter R. Waldron.)

The Witness: Not this particular one, Mr. Black, but there were many during my time with him.

Mr. Black: You have no actual recollection of that document at all?

Mr. Ackerson: Of Mr. Arnett signing it, you mean?

Mr. Black: Yes.

Mr. Ackerson: In his presence?

Mr. Black: Yes.

The Witness: I have seen him sign this right here where it would say "Okay, R.W.A.," in my presence on various occasions. You have some here I noticed a while ago, right here, for instance, "quote okay, R.W.A."

Q. (By Mr. Ackerson): And you are referring to the second sheet in the document there?

A. Yes. [200]

Mr. Black: I renew my objection that he hasn't sufficiently identified the particular document he was talking about.

The Court: It is a jury question as to whether he has or has not, but they will take the testimony of the witness and not the leading questions that were originally by counsel.

Mr. Ackerson: I am sorry about the leading questions, your Honor. I think I am trying to rush this a little bit.

Q. Now we have covered the first four pages, Mr. Waldron. Is there anything different on the fifth page or the fifth set of documents here?

A. Yes.

(Testimony of Walter R. Waldron.)

Q. Relating to the Floral Drive, Whittier School bid, that you can depict as distinguished from the Howard documents?

A. In that the take-off was made by my associate, Elmer Lysfjord.

Q. How do you determine that?

A. By the initial "E" up here. That was often done—I must go back to what we call the green sheet, a publication of all works in the building industry, and one member of the office staff would clip these out and attach them to a sheet of this nature, and they would determine through area for which we covered the majority of general contractors in [201] that area, and the person covering that area would be designated to make the take-off because he had that little advantage of 5 against 3 in order to get the job. And this particular one happened to go to Elmer, and he made a take-off—I recognize the way he does it, and he can verify that—however, it was never extended.

Q. By "never being extended," you mean what?

A. It wasn't totaled up, it wasn't added and multiplied and the various materials haven't been separated, and consequently no work-up of cost material, freight, nails, moldings, and things that are necessary, vitally necessary, before you know what you are bidding on.

Q. Well, now, I notice on the back of that part of the exhibit there is some more longhand writing on a scratch pad. Can you identify that writing?

A. I believe it is Mr. Arnett's writing. I don't re-

(Testimony of Walter R. Waldron.)

member this particular item. I believe he would have given this to my associate, Elmer, to follow up as he has with me on jobs that I was supposed to take care of, but I believe that is his writing. And it is marked up. He has a certain amount there, and then it is marked up, and this one I believe can be found out that it went to the Shugart Company.

Q. And is there any indication on the document itself?

A. Well, this particular one was unbeknownst to us—I say "us," the salesmen were not supposed to know about [202] this, and I didn't know about it until later on in the late fall of '51—what we were actually in with, and this one says "checked by D," which was that the Downer Company was to have someone make a check, or make a take-off on that particular piece of work, in order to assure the person who is supposed to get the job that they are in line in their quantities of material and specifications. [203]

Q. Can you state from this document that Shugart did get the job?

A. Yes, this indicates that Shugart did get the job, and I believe it can be found out at the School Board.

Q. The Downer Company never did complete sufficient data for a bid?

A. No; no, they didn't. They weren't interested, apparently, in that job.

Mr. Ackerson: I will offer that as the others, as Plaintiff's next in order.

(Testimony of Walter R. Waldron.)

Mr. Black: Subject to the same objection, if the court please, that there is no connection shown with the defendant Flintkote; same ground covered in our motion this morning.

The Court: Received into evidence.

(The document heretofore marked Plaintiffs' Exhibit 21 was received in evidence.)

Mr. Ackerson: May I have this series of documents marked Plaintiffs' Exhibit next in order for identification.

The Clerk: Plaintiffs' 22 for identification.

(The documents referred to were marked Plaintiffs' Exhibit 22 for identification.)

Mr. Ackerson: This next series of documents, may I have that marked for identification as Plaintiffs' next in order?

The Clerk: 23 for identification.

(The documents referred to were marked Plaintiffs' Exhibit 23 for identification.) [204]

Mr. Ackerson: And the next series of documents, marked similarly, Plaintiffs' next in order for identification?

The Clerk: Plaintiffs' 24 for identification.

(The documents referred to were marked Plaintiffs' Exhibit 24 for identification.)

Mr. Ackerson: And a single document, marked Plaintiffs' Exhibit next in order for identification.

The Clerk: Plaintiffs' 25 for identification.

(Testimony of Walter R. Waldron.)

(The document referred to was marked Plaintiffs' Exhibit 25 for identification.)

Mr. Ackerson: And similarly, the next number of documents.

The Clerk: Plaintiffs' 26.

(The documents referred to were marked Plaintiffs' Exhibit 26 for identification.)

Mr. Ackerson: Similarly, I hand you another number of documents to be marked as Plaintiffs' Exhibit next in order.

The Clerk: Plaintiffs' 27.

(The documents referred to were marked Plaintiffs' Exhibit 27 for identification.)

Mr. Ackerson: I hand you another set of documents to be marked similarly.

The Clerk: Plaintiffs' 28.

(The documents referred to were marked Plaintiffs' Exhibit 28 for identification.)

Mr. Black: Are these the same general type of documents, [205] Mr. Ackerson?

Mr. Ackerson: Yes, Mr. Black, these had been submitted to Mr. Doty.

If it is agreeable with you, Mr. Black, I am going to ask the witness the general question with respect to each of these documents, as to whether or not his testimony would be the same as in connection with the exhibits prior to the last exhibit entered.

(Testimony of Walter R. Waldron.)

In other words, the general evidence that he gave with respect to the Howard set of documents.

Mr. Black: There will be no objection to that, subject, of course, to our objection to this entire line of testimony.

Mr. Ackerson: Yes.

Mr. Black: And our motion to strike it.

Mr. Ackerson: Yes. I am merely trying to conserve time, without a lot of repetition.

Q. (By Mr. Ackerson): Mr. Waldron, I show you Plaintiffs' Exhibit 22 for Identification, and ask you if your testimony in connection with the similar documents, relating to the Howard Company bids, would be the same with respect to this exhibit or substantially the same as it was in connection with the prior exhibits mentioned.

A. The only exception would be that these were The Sound Control jobs given by the other contractors.

Q. In other words, Exhibit 22 for Identification relates [206] to similar bids in which Sound Control obtained the job? A. That is right.

Q. Would your testimony be the same with respect to Exhibit 23 for Identification, with the exception that another contractor got those jobs?

A. Yes, this would be Acoustics, Inc.

Q. I ask you the same questions with respect to Plaintiffs' Exhibit 24 for Identification.

A. Yes, these went to the Shugart Company.

Q. I ask you the same questions with respect to Plaintiffs' Exhibit 26 for Identification.

(Testimony of Walter R. Waldron.)

A. Yes, these were allotted to the L. D. Reeder Co.

Q. I ask you the same questions with respect to Plaintiffs' Exhibit 27 for Identification.

A. Yes, these were allotted to the Paul H. Denton Company.

Q. I ask you the same questions with respect to Plaintiffs' Exhibit 28 for Identification.

A. Yes, there seems to be one for about four different people in there.

Q. Will you state the people that are listed in there, in that exhibit?

A. The first one is L. D. Reeder and the second one is Sound Control. The third—may I pull this off here (indicating)? [207]

Q. Yes.

A. ——would be Coast Insulating Products.

Q. Louder, please.

A. Coast Insulating Products. This is four, isn't it?

Q. Yes.

A. Four would be Coast Insulating Products. Five and last would be Shugart Company.

Q. Would your answers be substantially the same, with the final exhibit for identification, Plaintiffs' Exhibit No. 25?

A. Yes. That is the Coast Insulating allotment.

Mr. Ackerson: I will offer Plaintiffs' Exhibit 22 for Identification in evidence.

I will offer Plaintiffs' Exhibit 23 for Identification.

(Testimony of Walter R. Waldron.)

Plaintiffs' Exhibit 24 for Identification, I will offer.

Plaintiffs' Exhibit 26 for Identification, I will offer.

Plaintiffs' Exhibit 27 for Identification, I will offer.

Plaintiffs' Exhibit 28 for Identification, I will offer in evidence.

Plaintiffs' Exhibit 25, I will offer in evidence.

Mr. Black: Of course, if the Court please, they are subject to the same objection and to our motion, and all the testimony in connection with the subject.

The Court: The offered exhibits are admitted into evidence. [208]

(The documents heretofore marked Plaintiffs' Exhibits 22 to 28, inclusive, were received in evidence.)

Mr. Ackerson: Now, if Your Honor please, in view of a memorandum which has just been promised Your Honor I am going to close the direct with Mr. Waldron, with the exception that if Mr. Black's understanding with me is approved by Your Honor, I will be able to call Mr. Waldron back for the limited purpose of testifying on maybe a couple of points on damage, which will probably have to be resolved in the light of Your Honor's acception and consideration of the legal memorandum.

Any objection to that?

Mr. Black: No objection to that. That is satisfactory.

(Testimony of Walter R. Waldron.)

Mr. Ackerson: Is that satisfactory with the Court?

The Court: It is satisfactory with the Court if it is with counsel.

Mr. Black: Yes, we will so stipulate, he may be called back for that limited purpose.

Mr. Ackerson: You may cross-examine, Mr. Black.

Cross-Examination

By Mr. Black:

Q. Mr. Waldron, when you were enumerating the manufacturers of acoustical tile in the Los Angeles area you didn't mention Fiberglass, if I recollect correctly.

Do you remember there was such a product in the local market? [209]

A. Yes, I do, but I didn't remember of mentioning where they were manufactured, Mr. Black.

Q. You didn't include it among the manufacturers' products in the local market, as I recall your testimony. A. Oh, I see.

Q. There was such an acoustical tile sold in Los Angeles at the time?

A. I don't believe, Mr. Black, that that would be considered a competitive material with the material that we were buying at the time.

Q. Why not?

A. It is a premium type material and it is more expensive than the material, and it doesn't do any more work than the material we were buying at the time.

(Testimony of Walter R. Waldron.)

Q. Did you know how much was being sold in the local markets and installed by some of the acoustical contractors?

A. Yes, wherever it was specified.

Q. Do you happen to know the company that makes that product?

A. Owens-Corning, I believe, Fiberglas Corporation. [210]

Q. And that is an AMA tile, is it not?

A. I believe it is.

Q. I now refer to your testimony in connection with the first meeting with the Flintkote people that you attended, which I believe you state took place at the Manhattan Supper Club.

A. I believe it was, Mr. Black, of an official nature.

Q. All contacts prior to that time were more or less informal ones with Mr. Ragland, was my understanding correct?

A. I think that is right.

Q. Do you recall giving a deposition, Mr. Waldron, on October 13, 1952, in connection with this case? A. Yes, sir.

Q. Now, I invite your attention to page 18 of that deposition—do you wish to refer to it, Mr. Ackerson——

Mr. Ackerson: I don't have it.

Mr. Black: You can look over my shoulder.

Q. ——and ask you if you gave the following testimony, I will start at line 13 so it will become more intelligible:

"Q. Now, did you, during this time of explor-

(Testimony of Walter R. Waldron.)

ing the possibility of a supply of acoustical tile, talk to anybody representing Flintkote on the subject of a supply? [211] A. Yes.

"Q. Now, so we will have an orderly development of it, I take it you had more than one conversation on the subject with Flintkote. Tell us when the first one was, about, and who was there.

"A. I can't remember which was first, but I remember being in their office, and I am going to assume that was first. I believe it can be established later, if necessary.

"Q. That was in the Flintkote office?

"A. I believe it was.

"Q. Whom do you now recall was there that was interested and you spoke with?

"A. I believe I met Mr. Baymiller and Mr. Thompson and Bob Ragland in the office at that time.

"Q. About when was that, to the best of your recollection?

"A. Well, I don't know for sure. I think it was somewhere along in the fall of '51.

"Q. Was Mr. Lysfjord there at that time?

"A. Yes.

"Q. Tell us, to the best of your recollection, what was said at that meeting by any persons [212] present.

"A. Well, I think that meeting was generalities and background and how long we have been operating in the business and what we knew about it.

(Testimony of Walter R. Waldron.)

"Q. You mean questioning of you?

"A. More or less, I think, and general get acquainted meeting.

"Q. Were the subjects of credit and available investment capital discussed?

"A. I hardly think so at that time. I believe that was the first meeting. I think that they probably assumed that we either had something to operate on or we wouldn't be there until such a time that we felt——"

I am trying to pass over some material that doesn't appear relevant to this subject.

Going on to page 21, you were asked about some various other matters of preliminary operations of the business and you stated:

"A. It was agreed on that we should sell in the Los Angeles area.

"Q. Now, you say that was agreed upon. Tell us how that—— A. It was a verbal agreement.

"Q. When, at that meeting? [213]

"A. No, I think it was a different meeting. That first meeting—you brought that in—but the first meeting, it was just generalities and getting acquainted."

Now, did you give that testimony? [214]

A. I think so, but I believe that, as was mentioned there, that I wasn't sure which was the first and which was the second meeting, if that is what you are trying to establish at the moment.

Q. That was rather shortly after the events that we were talking about, wasn't it?

(Testimony of Walter R. Waldron.)

Mr. Ackerson: I would like, Mr. Black, to state what events you mean. I mean it is rather indefinite. I will object to it on that ground.

Q. (By Mr. Black): The date is October 13, 1952. You have no reason to doubt that the date is not correct, that the deposition bears?

A. No, not at all.

Q. Now on page 23 I will ask you if you recall giving this testimony:

"Did you have a later meeting with Flintkote or its representatives on the subject of its proposed line?

"A. Yes, sir; I think when they decided we were a good risk. We had a meeting where we—I don't remember words, however——

"Q. Well, about when did it happen?

"A. I don't know, probably a couple of weeks or a week or two after the one I just [215] mentioned.

"Q. That would still be in '51? A. Yes.

"Q. Might it be in December of '51?

"A. Well, I don't think it is quite that late. I believe it must have been in November, somewhere in there.

"Q. Mr. Lysfjord was there? A. Yes.

"Q. And you both, at that time, still were with the Downer Company, I take it? A. Yes.

"Q. Who else was there?

"A. Mr. Baymiller and Mr. Thompson and Mr. Ragland.

"Q. Where did it occur?

(Testimony of Walter R. Waldron.)

"A. It occurred at lunch, in a cafe.

"Q. Manhattan Club?

"A. I think that was it.

"Q. On Western Avenue in Los Angeles?

"A. Yes.

"Q. Tell us what was said then by anybody.

"A. Well, I think generalities were again brought in and the fact they were very pleased with what we had to offer as an outlet for acoustical tile, and they felt—and it was virtually [216] assured that we would be an outlet, and for us to prepare a financial statement.

"Q. What had you shown them as to what you had to offer, what information had you given them or did they obtain, if you know?

"A. Any information I gave them was verbal."

Then on page 36 you were asked the question, at line 5:

"Q. Aside from the second meeting with Flintkote representatives that you could recall, which was at the Manhattan Club, do you recall attending any later meeting on the subject of obtaining a supply from Flintkote?

"A. I think that was the last meeting. As a matter of fact, that was the last meeting where they assured us that they would go along with us on the deal and sell us tile and they assured—I—they—I can't remember all those things.

"Q. Do you remember attending more than one meeting at the Manhattan Club with Flintkote people on the subject of obtaining the supply?

(Testimony of Walter R. Waldron.)

"A. No, that is the only meeting there.

"Q. You had one before that that you could recall at the Flintkote office?

"A. Yes, I am sure it was at the Flintkote office."

Do you recall giving that testimony? [217]

A. I am sure I did, Mr. Black.

Q. And in that testimony you omitted completely any discussion of a meeting with Mr. Harkins and stated the last meeting you had was the one at the Manhattan Supper Club. That is not the fact, as I understand you?

Mr. Ackerson: I object to Mr. Black's construction of the language. I think it speaks for itself. I don't construe it the same way at all, nor do I see any inconsistency.

The Court: He is asking him now whether it was or was not the fact.

Q. (By Mr. Black): Is it not the fact that you made no mention in that deposition of a meeting with Mr. Harkins?

Mr. Ackerson: Along the line you have read?

Q. (By Mr. Black): Or anywhere else in the deposition after the meeting at the Manhattan Supper Club which, according to your testimony, was the last meeting you had? You did not say anything about a meeting with Mr. Harkins?

A. I don't remember the deposition, Mr. Black, but the meeting in the office of the Flintkote people that I refer to there I believe was the last meeting

(Testimony of Walter R. Waldron.)

that I was referring to as in their office rather than when it took place.

Q. What has happened since the giving of this deposition that has caused your recollection to be changed on [218] the subject, if you know?

A. What change did you have in mind, Mr. Black?

Q. Well, if I am quoting you incorrectly, please let me know. I don't want to take any unfair advantage of you. But according to this testimony you stated very positively that the first meeting was at the Flintkote office that you attended, that the second meeing was at the Manhattan Supper Club, and that there was no other meeting, and you made no mention of the Harkins meeting. Now if that is an unfair construction I want you to tell me, and if it is a fair construction I would like to know what it is that has refreshed your recollection since you gave that testimony?

Mr. Ackerson: I object to Mr. Black using his own construction and I say that it is not an accurate construction of the language you read from the deposition. I have no objection to him going to the deposition and rereading the language and interrogating the witness.

The Court: Do you want to accept the suggestion of counsel or do you want a ruling on the propriety of the question?

Mr. Black: I would submit to the Court's ruling on the matter.

The Court: Objection overruled.

(Testimony of Walter R. Waldron.)

Mr. Witness, if you don't understand the question, say so, and then counsel will have to reframe it, whether it is [219] a proper question or not. It isn't a proper question in a practical sense if you don't understand the question, so we will ask the reporter to read it back to you and if you understand it, answer it, and it being somewhat lengthy you may give a lengthy answer, but if you don't understand it, you say so and Mr. Black will reframe it.

> (The question referred to was read by the reporter as follows: "Q. Well, if I am quoting you incorrectly, please let me know. I don't want to take any unfair advantage of you. But according to this testimony you stated very positively that the first meeting was at the Flintkote office that you attended, that the second meeting was at the Manhattan Supper Club, and that there was no other meeting, and you made no mention of the Harkins meeting. Now if that is an unfair construction I want you to tell me, and if it is a fair construction I would like to know what it is that has refreshed your recollection since you gave that testimony.")

The Witness: To answer one question about Mr. Harkins, I don't know that I was asked to relate—I don't know how that was in the deposition. However, meeting Mr. Harkins did happen, and being in the Manhattan Supper Club for lunch did happen. [220]

(Testimony of Walter R. Waldron.)

Q. (By Mr. Black): Is there any particular event that has caused you to get the order of these meetings changed in your mind?

A. I wasn't sure of them at that time, as I stated.

Q. Are you sure of them now?

A. I believe I am, yes.

Q. What causes you to be sure of them now, when you weren't sure of them in 1952?

A. This going back through my years of work and trying to find out which was first, which I did, and talking to my associate. He helped me find out which was which.

The Court: I think some of these jurors have served only in criminal cases where depositions are very rare, so it might be appropriate to have a brief explanation of what a deposition is.

When a person brings a lawsuit against another, the one that is sued has the right to call the one who is doing the suing into their attorney's office and ask them questions under oath, having present a Court reporter, such as we have here. That right exists also as to prospective witnesses in a case.

It is done so that the person opposing the suit can explore into the basis for the suit and determine what factual situations they are called upon to defend against.

It is also done to preserve the testimony of a witness [221] who might not be available at the time of trial, so that the deposition might be read in

(Testimony of Walter R. Waldron.)

place of getting along without the testimony of the witness.

What Mr. Black has been reading from is a deposition taken by him on behalf of his client Flintkote Company, shortly after this witness commenced his action against The Flintkote Company and others.

Is that a sufficient statement, counsel, or does it need to be amended or clarified in some way?

Mr. Black: So far as I am concerned, Your Honor——

Mr. Ackerson: It is an adequate statement, Your Honor. Since plaintiffs took a deposition, likewise, I think the jury should know the plaintiffs have a similar right.

The Court: Yes. I didn't mention that because we didn't have the plaintiffs' deposition before us at the time. That is the common right in lawsuits. Any suit that amounts to much, either side takes a deposition of everyone they can think of on the other side, so they can learn what that other side's witnesses are going to say at the trial.

Mr. Ackerson: That suffices. I was merely trying to save the Court's time, rather than have them instructed again, in the event I use a deposition.

The Court: Thank you.

The Witness: May I ask a question?

The Court: The witness says, "May I ask a question?" [222] That is out of character, for the person who is in the capacity of a witness, who is

(Testimony of Walter R. Waldron.)

here to answer questions. Perhaps he has something he wants clarified.

Go ahead and ask it. There might be an objection.

The Witness: I would like to ask my counsel if he has my corrected copy. I think I made some marginal notes in there some time ago.

Mr. Ackerson: I feel apologetic to my client and the Court and counsel. I have carried those to the Court every day except today. I do know there were marginal notes on it.

I might ask the Court—not to instruct—but merely inform the jury it is customary to make some changes. Perhaps that can be delayed, because we don't have the changes here and I realize there is an explanation to be made when the witness does change, in substance, his deposition.

So I will withdraw the request.

I do not have your deposition here, Mr. Waldron.

Mr. Black: I will make the stipulation with Mr. Ackerson that if, after this examination is completed, we find that any of the answers I read to him from the deposition were, in fact, corrected by interlineation, you may recall him to explain it.

Mr. Ackerson: Thank you. I don't believe it is necessary, Mr. Black. I have seen those corrections and I don't believe, frankly, there is anything to correct. [223]

Q. (By Mr. Black): During the course of this trial, Mr. Waldron, I think you testified that at the meeting at the Manhattan Supper Club with Mr. Thompson, Mr. Ragland and Mr. Baymiller, you

(Testimony of Walter R. Waldron.)

stated that, you made the statement that the acoustical contractors weren't competing with each other any more and that they wouldn't object to your coming into this business.

A. That I would not object?

Q. No. And that they would not, the other acoustical contractors, to your coming into this field.

A. That is right, sir.

Q. Do you recall giving a deposition at my office last Tuesday? A. Yes.

Q. Do you recall my asking you about that conference and asking the question, "Now, is there anything else that happened there?"

And you stated, "No, there is nothing else."

And do you recall that you did not testify about any general contractors not competing with each other?

A. Mr. Black, I don't know how I used that in your office. But that is the knowledge that I passed to Mr. Thompson, and Mr. Baymiller and Mr. Ragland were present, and Mr. Lysfjord.

Q. What refreshed your recollection about that particular [224] matter between Tuesday and the present date?

A. I believe I mentioned that that was all I could think of at the moment. Do you want to read that back?

Q. That is perfectly correct, all you could think of at the time? A. Yes.

Q. Apparently, you couldn't think of it then and

(Testimony of Walter R. Waldron.)

I am asking you now what made you think of it between Tuesday and the present date, if anything?

A. Refreshing my memory from note—I don't have the note here, but notes I made after your deposition, or the first deposition, and to train my mind to think of the ways in which it actually happened, rather than trying to guess about it at this time.

Q. You did not bring those notes with you?

A. No, I don't have any here.

Q. May I ask that you produce them so I may examine them during the course of the trial?

A. I will do my best, sir.

Q. Now, at this meeting at the Manhattan Supper Club, at which the three Flintkote representatives were present, and you and Mr. Lysfjord, do you recall Mr. Thompson telling you that there was no possibility of you people being given a general permission to operate in the Los Angeles area?

A. No, sir, he didn't say that, sir. [225]

Q. Do you recall asking him whether it would not be permissible for you to deal in Los Angeles with certain contractors with whom you had a particularly close connection, and his replying to you at that time that if anything of the sort comes up it will have to be dealt with as a special case? Do you recall that? A. No, sir, I don't.

Q. Do you recall either Mr. Lysfjord or yourself at that conference asking whether it would not be entirely in order for you to have the merchandise you purchased from Flintkote shipped to San

(Testimony of Walter R. Waldron.)

Bernardino and then hauled back into Los Angeles? A. That didn't occur, sir.

Q. That did not happen?

A. That is right.

Q. You do now recall the meeting with Mr. Harkins, I presume? A. Yes, sir.

Q. Has anything come up that has enabled you to fix with any definiteness the date of that meeting?

A. No, I don't have anything that would put that meeting on record as of a date.

Q. There is no note or diary entry, or anything of that sort that enables you to fix that date with any definiteness? [226]

A. No, I don't have one.

Q. What is your best recollection of the date of that meeting?

A. I would say it was the latter part of November, '51.

Q. Could it have been early December?

A. I don't believe so. At least, that is not my recollection, because I believe I can point that out, because we didn't rent our local office until after that meeting, and that was rented right around the first of December.

Q. Do you recall Mr. Harkins stating at that meeting that he wanted to be sure that you people, that is, you and Mr. Lysfjord, felt there was enough business in the San Bernardino-Riverside area to enable you to make a living?

A. No, he didn't quote, or, say anything like that in my presence.

(Testimony of Walter R. Waldron.)

Q. Do you recall making an answer to the general effect that you knew the territory pretty well and that there were enough malt shops out there to make a go of it?

A. On the contrary, sir, I didn't know the area at all, other than in an acquaintance I have out there that I would go and see occasionally, in the California Decorating Company, which is out of the acoustical field. [227]

Q. Hadn't you had prior experience as a salesman in that area? A. No, I hadn't.

Q. None at all at any time?

A. Not that I can recollect, other than maybe a rare occasion where some contractor here would send me out there to look at a certain job, but I never made any contacts out there in general construction work.

Q. Now I think you have testified, Mr. Waldron, that you were working for the Downer Company until January 10, 1952, am I correct on that?

A. Yes, I believe that is correct, sir.

Q. That you asked to be relieved at the end of December and they requested that you stay on until January 10, is that right?

A. That is right, sir.

Q. What did your duties with the Downer Company consist of until you terminated relations with them on January 10th? A. Sales work.

Q. Of what character? A. Acoustical.

Q. Well, I mean calling on new contacts or examining jobs that were already being installed,

(Testimony of Walter R. Waldron.)

or what in general did you do, if you remember, during that last period of your [228] employment with Downer & Company?

A. Just the same work I had always done, make take-offs, estimate jobs, work them up, bid them, but they were getting fewer and fewer because I didn't have the time, and I put a great deal of time in on my own enterprise.

Q. How much time did you give to Downer & Company during that period on the average a day?

A. That was not a problem. If I understand you right, I was never obligated to the Downer Company for any amount of time.

Q. I am not asking you about the ethics or the morals of your obligation; how much time, if you remember, did you put in on Downer & Company's work during the last month, say, of your connection with that concern?

A. I would say just about the same as I had always done. I don't know how to answer that, Mr. Black, for sure. But there were days before I ever decided to go into the business myself that I would go to the beach or I would go to the mountains, I wouldn't show up at all. But the results of my efforts at the end of the month was what they were interested in.

Q. During this period when you were still in the employ of the Downer Company, were you doing any work in the way of actually placing bids for your own enterprise?

A. Not at all. We were not ready. [229]

(Testimony of Walter R. Waldron.)

Q. You weren't soliciting any business on your own at all? A. No, sir, we weren't ready.

Q. So you didn't start that until after January 10th? A. Start what?

Q. Any solicitation of work for your own account.

A. I don't believe I started it even then because I don't know that we were quite ready. After we had our phones and stationery, we couldn't do much other than talk about it.

Q. Where was the Downer office?

A. On Hoover Street. I can't remember the number now. But it is just north of Beverly Boulevard about a block or two.

Q. That would be around Temple and Hoover, would that be about right?

A. Yes, it is three-something, I think it is three-something or other. I don't remember the address. I can get it for you.

Q. Did you go there practically every day during that period?

A. Oh, no. I never went there every day. That is one place a salesman can't make money, is in an office.

Q. How often did you go?

A. Perhaps once a week or twice a week as my needs arose. [230]

Q. Did you make it a practice to telephone there daily? A. Oh, yes. I picked up messages.

Q. From what place did you do your telephoning?

(Testimony of Walter R. Waldron.)

A. Any phone booth or any office I might be in if they had a phone free or from my home.

Q. Where was your home? A. Hollywood.

Q. How far from the Downer office was your home?

A. In mileage I don't know; it is probably three miles, four miles.

Q. Now when did you go to San Bernardino?

A. To do what, sir?

Q. To start the aabeta operation?

A. I was out there right at the first of the year, to locate, and I found a shop or warehouse. That was the first efforts I made even to do the mechanics of the aabeta company's efforts in San Bernardino.

Q. At that time did you make any contacts with prospective customers in the San Bernardino area?

A. No.

Mr. Ackerson: Mr. Black, I don't like to object any more than I have to, and I am not objecting now, but I am assuming you are talking about his first visit. I don't know whether he stayed a week or a month, but by the first visit I assume you are talking about a day. [231]

Mr. Black: I am talking about being out there in January.

Q. How long did you remain in January in the early days of your operations there when you got your lease?

A. I would be out there probably two, three days, maybe a week at a time, depending on events,

(Testimony of Walter R. Waldron.)

and the latter part of January I was out there at least three or four days a week.

Q. Where did you stay?

A. At various auto courts and oftentimes with my friend Bill Keown of the California Decorating Company. He has a residence there and I would stay there quite a bit.

Q. Did you stay at the Antlers Hotel in January of 1952 in San Bernardino?

A. I can't remember at the moment, but I believe I stayed there once or twice.

Q. You did, in fact, stay at that hotel at least on one or two occasions?

A. I can't even remember for sure, but I do have dinner there a great deal because it is a nice place to eat.

Q. Did you stay out there from the time you obtained your warehouse space until the first shipment of tile arrived?

A. I don't believe I did.

Mr. Ackerson: Mr. Black, are we still referring to the San Bernardino warehouse?

Mr. Black: Yes, we are still referring to San Bernardino. [232]

The Witness: I know I was out there off and on. I am out there off and on virtually year in and year out, because of the California Decorating Company, of which I hold an honorary office, and we do jobs together.

Now at any particular time I don't have any records of when I stayed, what length of time, but

(Testimony of Walter R. Waldron.)

I do believe I stayed at the Antlers Hotel once or twice out there.

Q. (By Mr. Black): It is probable, is it not, Mr. Waldron, that you stayed out there from the time you got your warehouse space until that first shipment of tile arrived from the Flintkote Company?

A. Oh, no, I went out there that morning. I believe I went out there that morning.

Q. How did you do it was coming out?

A. The Flintkote people told us.

Q. So you went out especially on that occasion to——

A. Receive it. I went out to receive it, that is right.

Q. And you had still left the address of the California Decorating Company on the delivery instructions apparently, is that correct?

A. I didn't leave it, I changed it after we got that, but apparently the trucking firm didn't get it because they did go over to the California Decorating Company first and then [233] were referred to the other warehouse.

Q. Were you at the California Decorating Company when it arrived? A. No.

Q. Who referred them to your correct San Bernardino address?

A. My associate there, Mr. Bill Keown.

Q. Were you at the San Bernardino warehouse when that shipment arrived?

(Testimony of Walter R. Waldron.)

A. Yes, I believe I was, and I was anxious about it. It was late.

Q. How many vehicles, if you recall, were used in delivering those cases of tile?

A. It was a truck and a trailer. I guess that is one vehicle, isn't it?

Q. Do you know whether there was more than one tractor?

A. Not at the moment, I don't. I know it was a truck and trailer. There were two businesses, I believe, and they parked one and unloaded one and then they unloaded the other one.

Q. Do you recall whether the second vehicle had only a small amount of tile in it?

A. No, I think they were both nearly full, or full. I don't know for sure. The load tickets would probably show [234] that in the event you have it.

Q. Did you sign on that occasion for that merchandise personally?

A. I am pretty sure I did.

Q. Do you recall whether it was more than one receipt? A. No, I don't.

Mr. Black: Do you have those receipts, Mr. Doty? I think we have a photostatic copy of those. I will produce the originals, if you wish, Mr. Ackerson.

Mr. Ackerson: No, Mr. Black. If you say they are photostats, it is all right to use the photostats.

(Exhibiting documents to counsel.)

Q. (By Mr. Black): I show you, Mr. Waldron,

(Testimony of Walter R. Waldron.)

what purports to be a delivery ticket of the Water-Land Truck Lines bearing the date January 18, 1952, merchandise from the Pioneer-Flintkote Company, consigned to aabeta company, and apparently bearing a signature, aabeta company, W. H. Waldron, at the bottom. Do you recognize that?

A. That would be W. R. I believe it should have been.

Q. Is that your signature?

A. Yes, I am quite sure it is. It sure looks like it. What do you want me to answer?

Q. Whether that is your signature on these two documents. [235]

A. Yes, I am quite sure they are.

Mr. Black: I am sorry I forgot to have these marked for identification first. May we offer these two documents in evidence as—do you use the letters for the defendant?

The Court: Yes; numbers for the plaintiff and letters for the defendant.

Mr. Ackerson: No objection.

The Clerk: That will be A and B.

(The documents referred to were received in evidence and marked Defendants' Exhibits A and B.)

Q. (By Mr. Black): I invite your attention, Mr. Waldron, to the fact that one of these tickets, Exhibit A, shows 924 cartons, and the second exhibit, Exhibit B, shows 76 cartons.

A. Two different sizes.

(Testimony of Walter R. Waldron.)

Q. Two different sizes apparently.

A. What is this date here?

Q. They are both dated the 18th of January, 1952.

A. Do you suppose that is when I signed them, on the 18th? [236]

Q. Well, that is what the date is it bears. That is all we know about it. The trucking company tells us they have no record of it, other than their own books; no recollection of it. A. All right.

Q. You signed for it, apparently?

A. I believe I did, yes.

Q. You signed for them at San Bernardino?

A. I signed one at San Bernardino, but not the small amount; that was signed at their office over here.

Q. On the same date?

A. No—I might have signed—I know what it was, yes.

They couldn't haul it all in one trip and they had to have a second signature to bring the balance at a later date.

There was a few cartons they couldn't do. We had them send those cartons instead of taking them over to our L.A. warehouse. I evidently signed them both there for that reason.

If that is the complete amount of the shipment, then I am right. If that is not the complete amount of the shipment, I signed two, but I don't know why I signed two.

(Testimony of Walter R. Waldron.)

Q. Would Mr. Ragland keep in touch with you during this period with some frequency?

A. During our operations in the aabeta [237] co.?

Q. Yes, sir. A. Yes, sir.

Q. He was out there, was he not, the very day this merchandise arrived?

A. Yes, I believe he was there that—he was there with an associate from his company. I believe he was there the day it arrived.

However, I am not sure. I know he was there.

Q. You went to lunch with him that day, as a matter of fact, didn't you?

A. I believe we did, yes.

Q. Didn't he come there telling you that he was coming to see that the merchandise was in good shape and that he was there for that purpose?

A. I don't know that he mentioned that, merchandise. That is probably one of the reasons. I mean he can verify that.

Q. You looked at the merchandise together as it came off the equipment, did you not, and found it received in apparent good order?

A. So far as I know. I hired some men and they unloaded it. I didn't inspect it particularly. When it was done I looked it over. I don't know what I would be looking for.

Q. You were interested in seeing that the merchandise [238] was apparently in good shape when it got there? A. I am sure it was, yes.

Q. And among other things, you and Mr. Rag-

(Testimony of Walter R. Waldron.)

land gave it a casual inspection as it was coming off the equipment.

A. I was very proud of it, to be truthful with you.

Q. I mean that is true, isn't it?

A. Did I answer your question?

Q. Isn't that a correct——

A. Pardon me?

Q. Isn't that a correct statement, you and Mr. Ragland casually inspected this merchandise as it was coming off and being unloaded?

A. I don't know there was any intent there, Mr. Black, on that purpose.

Q. I am not making a great point of it, but that is what happened, isn't it?

A. I don't believe it was intended to be an inspection trip, Mr. Black, really.

Q. Wasn't that one of the reasons he was there on that particular day? Didn't he tell you so?

A. I don't believe he did.

Q. Well, all right. Mr. Ragland would also frequently drop in at your home, would he not?

A. Yes, he has done that.

Q. Where did he live, if you know? [239]

A. Out in the Van Nuys area, or some—I don't know just what district, but it is by way—he goes by way of what is our Freeway and Cahuenga Boulevard. I live near Cahuenga Boulevard and often times on his way home he would stop by there.

Q. It was quite convenient for him to do so, was it not? It was really in his direct route home?

(Testimony of Walter R. Waldron.)

A. I would say it was virtually in his direct route home.

Q. And he made it a rather frequent practice to stop by and see you and talk to you about business or some social matter, isn't that correct?

A. Yes, I have had the pleasure of his association for 10, 12 years.

Q. Referring to the meeting at which your relations with the Flintkote Company were terminated, I believe you stated in your testimony at the trial that Mr. Thompson told you at that meeting that the reason for the termination was because you were operating in the Los Angeles area, is that right?

A. I believe that is the way he did it, said it or intended it.

Q. I invite your attention to your deposition that was given in October, 1952. I will go back to page 60, and referring to this termination meeting at line 19: [240]

"Q. What did he say, and when did he say it?

"A. On the day of termination I asked him, I said I didn't think the pressure——

"Q. Just a minute. Who was there at that time?

"A. That was Thompson, Baymiller, and Ragland.

"Q. And where? A. At my office.

"Q. Was Lysfjord there? A. Yes.

"Q. What was said?

"A. Well, they said they didn't feel that they could sell us any more, not because of them, because

(Testimony of Walter R. Waldron.)

the higherups decided they'd just have to quit, and they inferred that we were doing something that we weren't supposed to do, but we don't know what it is yet.

"Q. They told you they did not know what it is?

"A. No, I don't know what it is. That will probably come out eventually, but I asked Baymiller, or rather I said that the pressure must have been terrific from our competition to cause this to happen. He said there was pressure, and that is all he said."

Did you give that testimony? [241]

A. I believe I did, sir.

Q. What has caused you to remember that the reason for the termination given by Mr. Thompson was that you were dealing in the Los Angeles area since that deposition was given?

Mr. Ackerson: I am going to object to that, Mr. Black, on the grounds that the evidence you read, or the deposition you read, the witness' answer related solely to Mr. Baymiller. You haven't read anything which stated anything that Mr. Thompson said, and I think it is clear Mr. Thompson did most of the talking at that meeting.

Mr. Black: It is referring to Mr. Thompson. I will go back one more line, line 17:

"Q. What representative?

"A. Thompson."

I announced at the outset he was referring to Thompson.

"Q. What did he say, and when did he say it?

(Testimony of Walter R. Waldron.)

"A. On the day of termination I asked him, I said I didn't think the pressure——

"Q. Just a minute. Who was there at that time?

"A. That was Thompson, Baymiller, and Ragland.

"Q. And where? A. At my office.

"Q. Was Lysfjord there? A. Yes. [242]

"Q. What was said?

"A. Well, they said——"

Mr. Ackerson: I am just objecting to your own wording of it. If you want to ask about that language, I will withdraw it.

Q. (By Mr. Black): Is there anything that has refreshed your recollection on the matters or the reasons given for the termination since this deposition was given? A. I don't know that I——

Mr. Ackerson: Just a minute.

The Witness: ——quite get that.

Mr. Ackerson: I object to the question as assuming a fact not stated in the deposition or in evidence.

The Court: Sustained.

Q. (By Mr. Black): At that meeting did Mr. Lysfjord show Mr. Thompson the door and say he didn't want to speak to him again?

A. Mr. Ragland and I went out first and we were talking at the car, as I remember, and anything after that termination explanation—that is all they could do, they were sorry. Whatever the words were they used, I know they must have felt pretty rough there.

(Testimony of Walter R. Waldron.)

I am assuming again. I am sorry, sir.

What was said after I walked out and Bob and I were talking at the car I can't vouch for. [243]

Q. If any such thing happened you didn't see it, is that what you wish to tell me?

A. That is right.

Q. So you don't know one way or the other? Who went out first?

A. Bob and I, I believe, and we were talking. Then Baymiller came out and then Thompson and Elmer came out. I believe I am right on that.

Q. Now, referring to the so-called takeoff sheets which have been offered in evidence, I would like you to explain just what your duty was in connection with these documents.

A. Do you want in general or do you want me——

Q. Yes, in general. I am not asking at the moment specifically as to the contents of any of them. What was your particular job in connection with these documents?

A. These particular documents you are referring to?

Q. Yes, or other documents of that character.

A. My job was to bid the job if it happened to be a contractor that I was associated with. And the other men in our office, if any contractors that they were well acquainted with, they would take those and from this same sheet would bid. And the sheets I had in my briefcase were given to me to find out why we lost the job.

(Testimony of Walter R. Waldron.)

Q. By whom—— [244]

A. Does that answer your question at the moment?

Q. Yes. By whom were they given to you?

A. Mr. Arnett would do so and he would instruct his secretary, Miss Jagger, Jerry, to get these things ready after bids, and give them to the man whose contractor got the job, and go and find out who, or why we lost it. That puzzled me, too, for a while, believe me.

Q. What did you do after you got these sheets to determine what caused you to lose the job?

A. Put them in my briefcase.

Q. You did nothing about them?

A. Pardon me?

Q. You did nothing more about them?

A. Not at the moment. There is always another job to go and take on.

Mr. Ackerson: I don't think that is a responsive answer. Mr. Black is talking about these jobs (indicating).

Q. (By Mr. Black): I am trying to find out how these particular documents were delivered to you in the course of your duties at the Downer Company, and what you were supposed to do in connection with them, as part of your duties there.

A. That is right. I would take them and go to the contractor and find out why we would lose the job. I would have them in my briefcase, so I would just leave them in my briefcase and throw them

(Testimony of Walter R. Waldron.)

down at home; when and if I got [245] around to cleaning it out. That didn't happen very often.

Q. Did you go to the contractors in every instance to inquire why?

A. Sometimes yes. Sometimes if it was more convenient when I had time I would phone about it.

Q. Except in one or two rare instances you had nothing personally to do with the preparation of these documents, did you? A. No.

Q. Do you know of your own knowledge that the person who prepared that document didn't have some separate memorandum on which he computed the cost and the like?

A. Mr. Black, I was perplexed——

Q. Just a moment. Please answer that question. Do you know of your own knowledge whether the person who prepared those documents didn't have some separate memoranda from which he computed the figures, which resulted in the final figure you put on those papers? A. I do know that.

Q. How do you know that?

A. Because I was perplexed about it, too. I tried to find it. I would get Jerry. I would say, "I have got to have the takeoff. I don't know what I am talking about. I don't know whether I can lower my figure or whether we are bidding wrong or whether we are having some kind of costs [246] here that are not right in our merchandise. How can I know where to bid next time if I can't find out why this bid is wrong?"

(Testimony of Walter R. Waldron.)

Mr. Arnett would say, "We don't have any. That is it."

I would go to him. I asked him.

Q. How many times did you ask him?

A. I asked two people—I asked three people. I asked Mr. Griswold. I asked Jerry, the second, and I asked Mr. Arnett. And that sort of told me I didn't need to ask any more.

Q. Did you ascertain from any independent investigation on your own part, personal investigation, what the figure for the bid or the low figure on the particular sheet was derived from?

If I understand you correctly, there is a figure on those sheets and then there is a higher figure.

A. Yes. [247]

Q. Did you make personal inquiry to find out where this lower figure came from in any instance?

A. Yes, Mr. Griswold would tell me that that lower figure was a certain contractor, that that was after I pressed him to a point late in the fall of why I was losing jobs and not getting a chance to actually bid them, and Mr. Griswold would say, well, that had to be a job for somebody and we were given a complimentary figure.

Q. Did you ever personally make a check with the bidder on the particular contract to verify that?

A. I don't know that I follow you, Mr. Black.

Q. I say, your information, as I understand it, came from what Mr. Griswold told you which he in turn got from somebody else.

A. Yes. Mr. Birchenall, Jim Birchenall, who

(Testimony of Walter R. Waldron.)

was employed with the Schugart Company at that time, told me that they were worried about their position of not getting jobs because they in turn had these blank take-offs in their office also; and that was in the presence of Louis A. Downer, another acquaintance sitting at the same table.

Q. Did you ever personally go to the successful bidder on those sheets and find out what the amount of the bid really was? A. Did I do what, sir?

Q. Ever go to the successful bidder with respect to any [248] one of these sheets to find out what the amount of the bid was?

A. I didn't need to. I called the general contractor and asked him what the job went for, and he would tell me.

Q. Did you do that in every instance?

A. I think I did.

Q. Was that part of your duties with the Downer Company to do that?

A. That is the general rule of our sales manager, is to find out why we lose jobs and then make amends somewhere to not do it again in the event there is no error on the competitor's part.

Q. Did you ever make a report as to why these particular jobs?

A. I did the first few months, yes.

Q. To whom did you report?

A. At the meeting that we would hold in our office or direct to Mr. Arnett.

Q. Did you continue to get these documents up

(Testimony of Walter R. Waldron.)

to the very time you left the employ of the Downer Company?

A. I don't remember when the last one that I had anything to do with was. Some of these were my associate's, Mr. Lysfjord's. He would be in turn handed those things, too. So I don't remember when.

Q. Part of these documents that have been offered in [249] evidence, those that were handed to Mr. Lysfjord rather than to yourself are included? A. That is right, sir.

Q. You make no distinction between the two in talking about them?

A. No, only the one that I made a take-off on and it wasn't used. I am sure that was an effort I made. But oftentimes they have my initials on the side or if they are in a hurry they don't do that. But if one of the contractors that I associate with or work with gets the job, then it is handed to me to find out why I lost the job.

Q. Were they distributed in equal shares to the various salesmen in the organization?

A. No, I don't think so. It depends on how many of your contractors happen to be successful. When I say your contractors, it is people that we have certain areas to work in and contractors within that area.

Q. Going back a moment to the matter of this first shipment of tile that was delivered to you, do you have any recollection of the means of getting the smaller quantity that you mentioned to your

(Testimony of Walter R. Waldron.)

Los Angeles plant? A. Did I make what?

Q. Have any recollection as to the means whereby that merchandise was transported to your Los Angeles plant.

A. What, incidentally, are you referring [250] to?

Q. You made a statement, I believe, that the merchandise that was covered by this first shipment of tile was in small measure delivered to your Los Angeles plant.

A. Yes. I don't know whether we sent a truck for it or whether they sent it to our shop, but the Water-Land Trucking Company didn't supply the San Bernardino address with the complete shipment, and I believe that explains that extra signature you have on the smaller allotment, that that would have to come out of it at a later date. If the truck and trailer were loaded to capacity, and in lieu of sending it out there, we had it brought in to our warehouse because we could store that small amount here.

Q. Who arranged for that?

A. I think I arranged for it by telephone, but how, whether we sent our truck over or whether they brought it over, I can't remember.

Q. Who signed for it?

A. I don't know. I believe I did. But you will have to show me. Do you have that one, too?

The Court: We will recess until 3:30.

(Short recess.) [251]

(Testimony of Walter R. Waldron.)

The Court: Proceed.

Q. (By Mr. Black): Mr. Waldron, going back for the moment to the early stages of these negotiations with The Flintkote Company in connection with obtaining of a line of tiles from that company, did you have many discussions with Mr. Ragland in an informal way on that general subject, about the possibility of his giving you Flintkote line?

A. I don't believe there was any real discussion, other than to pass the word along, or something of that nature.

Mr. Lysfjord and he worked closely on that, and as far as actual formulating of purchase of the product was concerned, I did have talks with him at my home, I am sure, regarding it. But for other than the possibility it was worked out by he and Lysfjord. They started on that some time before I was in the picture.

Q. At any of the discussions between you and Mr. Ragland, on the subject, do you recall his telling you that he thought there was no possibility of getting established in metropolitan Los Angeles, but that some of the outlying territory might possibly be available?

A. No, I think that was in reverse. I think that my understanding of all these conversations was that they had a need in addition to Los Angeles for outlying coverage. They weren't being adequately covered at that time. [252]

Q. Specifically, do you recall his stating to you, or to you and Mr. Lysfjord, in some of those early

(Testimony of Walter R. Waldron.)

discussions before you had the meetings with his superiors at Flintkote, there might be an opportunity in places like Tucson or Albuquerque or Denver?

A. No, I don't believe I remember such conversation. I had no reason to want anything like that in my mind.

Q. Is it not the fact you made a trip to Phoenix during these early stages, to take a look at that area? A. No, that is not true.

Q. It is not true? A. That is correct.

Q. Did you go to Phoenix for any purpose during the course of these early negotiations?

A. I haven't been in Phoenix until this year.

Q. Never had?

A. As far as I can remember, unless I passed through. But never as a trip to stop in Phoenix for any purpose.

Q. Or to Albuquerque? A. No, sir.

Q. Do you know whether Mr. Lysfjord went there?

A. I don't know for sure. I am quite sure he didn't.

Q. Do you remember a conference with Mr. Ragland at the Atlantic Boulevard office about February 11 or 12, 1952, at which Mr. Ragland said that you weren't supposed to have [253] an office in Los Angeles?

A. He was there—you mean that he was at a meeting where he told us we shouldn't have an office in Los Angeles?

(Testimony of Walter R. Waldron.)

Q. Yes. He came down there alone and saw the two of you.

A. Not in any words that I can remember of like that. As a matter of fact, he had been there many times prior to that late date.

Q. That is a matter in dispute between us.

A. Yes.

Q. I am talking about this particular date and this particular subject. Do you recall such a meeting?

A. No. I recall nothing where he told us we shouldn't be in Los Angeles, when he was alone.

Q. Do you recall discussing with Mr. Ragland, in response to that suggestion, that one of these jobs which you were bidding on was the Wagner Construction job in Torrance?

A. I don't believe I quite follow you, Mr. Black. I don't mean that—I don't get the connection there.

Q. Well, I will be more explicit. In response to Mr. Ragland's statement that you were not supposed to do business in Los Angeles, did you not tell him that one of these jobs that you were working on was the Wagner Construction job in Torrance, and that that was the job you were [254] entitled to do in Los Angeles because that was what you called a closed account?

A. To answer your first question, no. And to answer this question, I don't remember of using any words of a closed account, Mr. Black, because I don't believe there is any contractors operating that can offer a closed account to any subcontractor.

(Testimony of Walter R. Waldron.)

And I have no closed accounts, as you put it. I have accounts where, if I am in line I would get a slight advantage, but I don't believe you could—or I wouldn't dare say there is such a thing as a closed account. [255]

Q. Did you, apart from the language "closed account," did you state in response to that question that the Wagner Construction Company job was a job where you had an inside position or a favored position in getting that work, or words to that effect?

A. Not following any answer of your first question, I am sure that that didn't occur.

Q. What is the situation, or what was the situation in February, 1952, with respect to the Wagner Construction Company and your relations with that company?

A. The only time I mentioned Wagner Construction Company to those people was at the meeting at the Manhattan Supper Club at lunch, and I had a contract, I believe, from them for a certain piece of work, it was quite a nice large job—I am quoting from memory—but I know that I probably told them that I had worked with the Wagner Construction Company for many years, but as far as closed account, I don't believe the word closed account could have possibly been used.

Q. Well, I am asking you whether you said, not at the Manhattan Supper Club meeting but at your own Atlantic Boulevard office, anything about your

(Testimony of Walter R. Waldron.)

having a favored position with respect to that particular account to Mr. Ragland.

A. I did not in response to the question you asked me first.

Q. Or at all? [256]

A. I can't remember at all making that.

Q. Did you have any connection with that company in the way of investment in it or partial ownership of anything—any other inside track to it?

A. Oh, no. I do not have any ownership or investment in that firm and I have never told anyone that I did.

Q. And your relations with it were simply predicated then on the fact that you knew them well and they respected your work, is that right?

A. I believe that would cover it.

Q. That was one of the concerns that you in point of fact were bidding on in Los Angeles at the period I mention, or negotiating for?

A. Well, if they had work to be bid on at that time I am sure I bid on it, but I don't think I remember the exact days.

Q. Do you specifically remember that one of the jobs that you did with the second shipment of Flintkote tile or the second or third shipment of Flintkote tile was a Wagner Construction job at Torrance? A. Yes, I believe we did have one.

Q. And did you also say at that time to Mr. Ragland that the Sharf Constructing Engineers Company, Thrifty Drug Store job at Los Angeles, or is it Mr. Sharf of the Contracting Engineers

(Testimony of Walter R. Waldron.)

Company—am I right on that? Is that the [257] name? Does that mean anything to you?

A. I only recognize the Contracting Engineers Company, but I don't know that particular person.

Q. Did you do a job for the Thrifty Drug Company about that time in Los Angeles?

A. No, I have never done a job for the Contracting Engineers Construction Company since we have been in business.

Q. Do you know the concern?

A. Oh, yes.

Q. Do you know a Mr. Sharf?

A. I do not at the moment. I didn't at that time.

Q. That is S-h-a-r-f, isn't it?

A. I don't know him.

Q. You just don't know him?

A. That is right. There are many people there, by the way, in that firm.

Q. In that concern?

A. It is a large firm. They have a large staff.

Q. And at that time were you or were you not acquainted with them?

A. No, the only person I was acquainted with there was Walter Lavine. I think he is still a member of the firm.

Q. And I understand you correctly, then, that that concern had nothing to do with any of the jobs that you were negotiating for at that time? [258]

Mr. Ackerson: Will you place the time?

Mr. Black: I am talking about February 11th or 12th. I am still taking about the same time.

(Testimony of Walter R. Waldron.)

The Witness: In your reference to that, the work we presented to your firm as clients, no, they didn't.

Q. (By Mr. Black): Or negotiating or attempting to get that work?

A. No, I never negotiated there. If I have done anything it has been strictly a bid, but I have never been successful there and I have never performed a job for Contracting Engineers.

Q. Did you bid on it at that period or thereabouts?

A. I didn't. I don't know if my associate did.

Q. He might have?

A. I don't believe so. I didn't handle the account over there.

Q. You just don't have any recollection one way or the other whether it was mentioned at that time?

A. No, not of negotiating.

Q. Now on the the matter of the first shipment of tile from the Flintkote Company, do you recall where the invoice for that tile was sent to you?

A. I think it was sent to the San Bernardino address.

Q. And do you recall the circumstances and means by which you made payment for that tile? [259] A. Yes.

Mr. Black: Counsel has produced two bank statements which I will ask——

Mr. Ackerson: Do you need the checks in there? You are welcome to them. I am just thinking of encumbering the record, that is all.

(Testimony of Walter R. Waldron.)

Mr. Black: I think the one check is all we need.

Mr. Ackerson: You help yourself.

Mr. Black: Will the Court bear with me while I disencumber the record?

The Court: Surely.

Mr. Black: May we rip these apart, Mr. Ackerson?

Mr. Ackerson: Go right ahead.

Mr. Black: I will ask that this bank statement and canceled check be stapled together as a single exhibit.

The Clerk: Defendants' Exhibit C.

(The document referred to was marked Defendants' Exhibit C for Identification.)

Mr. Black: I will ask that this be marked for identification as Defendants' Exhibit D.

The Clerk: Shall I staple them together?

Mr. Black: Yes, if you please.

The Clerk: Defendants' Exhibit D for Identification.

(The document referred to was marked Defendants' Exhibit D for Identification.) [260]

Q. (By Mr. Black): I now show you, Mr. Waldron, what purports to be a statement of account with the Bell Branch, Bank of America, at Bell, California, and ask you if that is the bank statement with reference to the aabeta company's account at that institution.

A. Yes, that is right.

Q. I invite your attention to the fact that as of

(Testimony of Walter R. Waldron.)

January 30, 1952, there appear two deposits of $3,000. Do you recall the circumstances under which that money was deposited in that account and by whom it was deposited?

A. I believe that I made the deposit.

Q. Do you remember whose funds were used to make it?

A. Yes, sir, Mr. Lysfjord's and myself.

Q. In equal amounts?

A. I believe so at that time.

Q. Do you happen to recall in what form that money was deposited, whether currency or checks or saving account transfers, or what it was?

A. I don't at the moment. I believe—I am not sure but I believe—it was in currency.

Q. I also invite your attention to the fact that there appears on the statement a debit item in the amount of $6,042.02, and attached to this statement is a check in that same amount dated January 31, 1952, in favor of the aabeta [261] company, signed by the company by yourself. Do you recall drawing that check against that Bell account?

A. Yes. [262]

Q. On the date referred to, January 31, 1952?

A. Yes.

Q. I now show you what purports to be a statement of account with the Baseline Branch, Bank of America, San Bernardino, California, for the aabeta co., and ask you if that is, in fact, the bank statement for the month of February, 1952, for that company, with that bank?

(Testimony of Walter R. Waldron.)

A. Yes, that is the one. I see—where do you see the February balance?

Q. On the margin there (indicating).

A. I see. Yes.

Q. The entries are all February, '52, Mr. Waldron. A. I see, yes.

Q. I invite your attention to the fact that in that account appears a deposit of $6,042.02, and I will ask you if that deposit does not, in fact, consist of the check that was drawn on the other account by which, or, which we have just discussed?

A. That is correct.

Q. And that deposit apparently was made, according to the statement on February 1, 1952?

A. Yes, that is correct.

Q. And attached to the statement is a canceled check dated February 1, 1952, in the amount of $6,042.02 in favor of the Flintkote Company, aabeta co. signed by yourself, and [263] I ask you if that is one drawn by you. A. That is correct.

Q. Is that the check that was sent to The Flintkote Company in payment of the invoice for the first shipment of tile? A. I believe it was, yes.

Mr. Black: I will ask these two exhibits be received in evidence.

Mr. Ackerson: No objection.

The Court: Admitted.

(The exhibits heretofore marked Defendants' Exhibits C and D for Identification were received in evidence.)

(Testimony of Walter R. Waldron.)

Mr. Black: Mr. Clerk, may I now have Plaintiffs' Exhibit 16?

The Clerk: Yes, sir.

Q. (By Mr. Black): I now refer you, Mr. Waldron, to your statement of profit and loss, your Exhibit No. 16, covering the period January 1, 1952, to June 30, 1952.

I have a photostat of that, so I can talk from the lectern.

I want to ask you a few questions about it. You will notice that the first item in that statement, Mr. Waldron, is in the amount of $36,006.93, representing, I presume, the gross income from sales. Is that correct? A. Yes, sir. [264]

Q. Now, are you able to testify what operations that covered?

A. That covered—you mean in material or time?

Q. Well, speaking generally, does it cover everything that you or your company did during that period? A. Yes, I am sure it did.

Q. Did you do any work, other than installing acoustical tile, that is reflected by that statement?

A. Yes. There were component materials in all acoustical tile. If you understand that, it takes other materials to create a job, backing, furring, suspension, were and channel and perhaps where it is necessary to have an R fire rating, we have the fire stop behind the acoustical tile. Is that what you had in mind?

Q. Yes. And also did it cover anything, other

(Testimony of Walter R. Waldron.)

than acoustical tile and the connected work with that? Did it cover any other kind of sales and labor, material or anything else?

A. Well, at that time I don't believe so. Since that time we have had—gone into other fields to supplement the loss of acoustical tile, of a competitive nature. But I believe that was the results, or very closely so, of the acoustical tile we had at that time.

Q. Now, search your memory carefully, I am not attempting to dispute you on this at all, but I want your [265] very best recollection on it, as to whether at that time you were not occasionally installing just ordinary insulation material or other types of construction work.

A. I don't believe we entered into the insulating end. I can't remember if we did any of that. If we did, it would be of a minute nature, because we don't have a direct supply of that, either, and it is highly competitive.

Q. Well now, is it possible that you could realize a net profit of over $8,000.00 on two carloads of acoustical tile? A. Yes.

Q. Where did these operations take place that are reflected in this gross income?

A. Los Angeles.

Q. All of them? A. Yes.

Q. There is no San Bernardino work included in this?

A. Oh, no. We had no contacts out there.

(Testimony of Walter R. Waldron.)

Q. Did you do any work in the San Bernardino area during this period?

A. Until your firm shut us down, I was working out there very vigorously.

Q. I mean did you get any jobs that you performed during this period?

A. No. Any commitments I had proposals out on I [266] withdrew out there, because, as you know, their proposals or bids are done during blueprint stage and the materials are not installed in our line until just about the finish of the job, which is three to six to eight to ten months away.

Q. Did you do any job at all in the San Bernardino area with the Flintkote tile? A. No.

Q. None of them?

A. As far as I can remember, I don't remember any.

Q. Tell me about the Arthur Murray job that has come up in the course of these depositions. Did you do that work?

A. Yes. The California Decorating Company held the contract. We, in turn, installed some acoustical tile there, if that is what you are referring to. But we bought that from a small amount of an odd size from the L. A. Downer Company, Riverside, and the difference in material we used was a residue from a firm that used to be English & Lauer that had the J-M—Johns-Manville—line at that time, and they discontinued the line and the California Decorating Company bought up the difference, what-

(Testimony of Walter R. Waldron.)

ever they had left. The odds and ends, and we used that in the Arthur Murray job.

Q. When was that job done?

A. During the time of that first deposition.

Q. Did you make any profit on it? [267]

A. Yes, but that was not just acoustical tile, Mr. Black. That was a joint venture between the aabeta co. and the California Decorating Company, and that was complete alterations within the entire structure. It was a $25,000.00 contract of alterations and decorations, you understand.

Q. Yes. But that was aabeta co. work?

A. That is right, in a way, except that happened after this, if you are referring to this.

Q. It happened after this period?

A. After this six months, yes.

Q. That is what I misunderstood you about. I thought you said it was during this period.

You mean you got the job, but it wasn't performed, is that correct?

A. We were performing it during the time of that first deposition. That would give you roughly the date.

Q. I see.

Mr. Ackerson: October of '52.

Q. (By Mr. Black): It comes after the period of this, covered by this statement (indicating)?

A. That is right.

Q. There is no San Bernardino work, then, reflected in this at all?

A. I don't believe there is.

(Testimony of Walter R. Waldron.)

Q. Now, the item, cost of sales, tell me what that [268] embraces?

A. Which one are you referring to?

Q. The second item on the statement, fifteen thousand—my photostat is so smudgy I can't read it. Read me that figure, please.

A. Cost of sales, sir?

Q. Yes, please. A. $15,552.94.

Q. What does that consist of?

A. That is evidently labor and materials. I don't —you could have me there, because I don't keep the books and I rarely look at them. Mr. Lysfjord could explain it more, but I believe that would be the total cost of labor and material, trucking and merchandise items and perhaps—I don't know whether it includes overhead—I guess not, because there are some other items here.

Q. That is what puzzled me. Sometimes the labor cost is in that and sometimes it merely reflects the cost of materials and commissions and I was wondering which in this case, if you know?

A. I don't know at the moment.

Q. Because you will notice the operating expense, you show an item of wages, what is it, $6,638.18? A. That is right.

Q. Whose wages are reflected in that figure? [269]

A. Well, I believe that is mechanics, installation mechanics and trucking and miscellaneous labor.

Q. And those would be the people you paid to install tile, is that right? A. I believe so.

(Testimony of Walter R. Waldron.)

Q. You didn't have any office help that you were paying a regular salary to at that time?

A. No, we didn't at that time.

Q. Was anybody else on your regular payroll, drawing a salary for any purpose?

A. No, sir. Truck drivers and the men in the field at that time were all we had.

Q. That would be included, however, in the wages? A. I believe it would, yes. [270]

Q. In any event your total operations showed a profit for the period of something over $8,000?

A. That is correct.

Q. During that period did you actually purchase any tile from any other source than The Flintkote Company?

A. There again I imagine we did, if we could get it, but I didn't do the purchasing. I imagine we bought whatever we could get, Mr. Black, but as to amounts, I don't know.

Q. Well, actually, the second and third shipments of Flintkote tile were considerably less than a carload, were they not, as you recall?

A. Yes. I don't remember the exact amounts but I think that is so.

Q. The total over-all was about 1⅓ carloads, wasn't it?

A. I imagine that, or 1½, something like that.

Q. I take it then you don't really know precisely what jobs did go to make up this gross income on this statement?

(Testimony of Walter R. Waldron.)

A. Yes, any job we did up to that day and was completed.

Q. You seem to be uncertain as to whether it does or does not reflect jobs performed with people's tile other than The Flintkote Company tile to any extent?

A. I am pretty sure, Mr. Black, unless we needed some [271] special size that we didn't have in stock, why this would be Flintkote tile. What I mean by special size is over 12 by 12, like 24 by 24, or something of that nature. I believe you supplied us with what we needed of that size at that time. So I believe that this would be 90 per cent or 98 per cent Flintkote tile. I thought it was all. I still don't know for sure.

Q. You still don't know positively. Did Mr. Lysfjord know that?

A. He could probably give you a closer answer than I because they have been compiling some of that information for you in the last week or two.

Q. Let me go back to one other question preliminarily: Do you happen to know how much floor space is needed to store a carload of tile, of standard size?

A. Well, it would have to be equal to 6 by 60 feet long, or 70—I am quoting the space in a car, the actual square feet I never figured out, if you wanted to square it—but a car is 8 feet wide, I believe, by about 60 feet long, and eight feet high inside, and whatever volume that amounts to would be one carload of tile, I believe.

(Testimony of Walter R. Waldron.)

Q. How many tiers high can you safely stow this material in a warehouse?

A. I don't know. It depends on how well you reach it, but if you can reach it, I don't know that that is—I don't think there is a limit except when you get to the load limit [272] of crushing those on the bottom.

Q. In other words, the cartons are such that they won't crush themselves by stacking onto an indefinite number of tiers, am I right on that?

A. I don't believe we would have to worry about that in a warehouse such as are being used now, but you can stack it up 15 feet high.

Q. What are the dimensions of a carton of tile approximately, a single carton?

A. They are roughly 13 inches wide by 24—I have never measured one, by the way—about 2 feet six long and about 15 or 16 inches deep.

Q. Do cartons vary in size depending on the size of the tile?

A. No, I think they hold pretty uniform. They just put fewer in if it is a thicker tile.

Q. Do you recall the exact dimensions of the warehouse you had at Bell?

A. I don't at the moment, but it could be had.

Q. Can you give me an approximation?

A. No. I think we had a thousand square feet of space, but how it was dimensioned I don't know at the moment.

Q. How much of that was used in office space, if any?

(Testimony of Walter R. Waldron.)

A. Oh, about 10 by 15 or something like that, I imagine.

Q. And how high was that building, the interior? [273]

A. About nine feet, I believe, or eight or nine, somewhere in there.

Q. When did you acquire this second Los Angeles warehouse that I think was mentioned in your testimony?

A. In anticipation of our next carload of material, we acquired one—I don't remember the street but it is east of our warehouse, a half a mile or so along the river—but it was a little short inroad there, and I don't remember what the name of the street is.

Q. When did you acquire it?

A. I don't remember.

Q. Did you take a lease on it?

A. I don't think so. I think we just rented that.

Q. Do you have any writing or document that will refresh your recollection on when that was acquired?

A. I believe we paid by check so I think we would have those.

Q. Would you look that up and give it to your counsel so that we can fix the date of that?

A. Yes.

Q. Now how big was the warehouse at San Bernardino?

A. There I will guess again, but it was several times larger than the one we had in Los Angeles. I

(Testimony of Walter R. Waldron.)

would say it was 25 feet wide or 30 feet wide by 50 feet or perhaps 60 feet deep. [274]

Q. And how high was the ceiling in that storage room? A. I think it was about 10 feet.

Q. Now I think you said that you were under the impression that it cost you more to have a carload shipment delivered to you in two places?

A. I understand that is true. That is called stop-over.

Q. How do you understand that?

A. That is what we are doing now. If we have a car stop, it costs more money than if we deliver it in one place. I don't know just what they call it, in one routing.

Q. Did you ever make any inquiry of anybody at the Flintkote Company, whether they would charge you more to split a carload in two deliveries than to put it in one place?

A. No, but they are lcl lots and indicated as such on their price sheets.

Q. This is not an lcl lot. I am talking about ordering a car. Suppose you ordered a car and after it arrived on the water carrier at the dock, suppose you wanted part of that delivered to a job and part at your place of business, do I understand that you would have to pay more for that than you would if it all went to your warehouse first?

A. That is what I thought at the time and I believe it does.

Q. Did you ever make any inquiry of Flintkote

(Testimony of Walter R. Waldron.)

whether [275] it would cost you more in this particular connection?

A. Well, we had their information to go by, Mr. Black, and it states cars or lcl.

Q. This is not a split car, it is a shipment to yourselves?

The Court: What do you mean by lcl?

The Witness: Less than carload lots.

Q. (By Mr. Black): They quoted a price to you, a delivered price, did they not? You didn't have to pay for your transportation to your point of destination, did you? A. Yes, that is true.

Q. That is correct? A. That is right.

Q. So far as you know, you never made any personal inquiry of anybody at Flintkote as to whether it would cost you more or the same to have that car delivered to you in two places rather than one?

A. Except their stationery or their price list. I don't know if I made any inquiry, no. I don't know. But it is very plain that stop-overs or lcls are changed in price in the delivery or the cost of the material.

Q. And you interpreted that to be a less than carload deal or a stop-over?

A. Yes, it works that way with us now. If we stop a [276] car some place they charge us more although we buy the entire car. That still happens. [277]

Q. Then I understand you that none of this material that was delivered to you at San Bernardino was actually used by you in that area?

(Testimony of Walter R. Waldron.)

A. That is correct.

Q. When was it hauled back to Los Angeles?

A. I don't know the exact dates there. I say, we had a superintendent and I worked in the field, so I don't know when. But eventually we brought it all or sold it to someone out there, rather than installing it.

Q. Do you know whether any part of it was hauled back to Los Angeles before the termination meeting?

A. No, I am quite sure it wasn't, Mr. Black.

Q. What makes you quite sure about it, Mr. Waldron?

A. We hadn't anything to put it on here. We didn't have any job at the moment that required any quantity, and if you are referring to the job that we did for the Owens Roofing Company, that material was picked up or it was delivered from the Waterland Truck Company. That was not delivered to San Bernardino, because of overload, or it was more than their trucks would haul at that time.

Q. Now, I call your attention to the fact your deposition in October, 1952, page 50, the question asked:

"Q. Now, you say you do not know when you actually hauled some of that Flintkote material back to Los Angeles but that you did haul some of [278] it. Now, isn't it true that some of that hauling back occurred before Flintkote terminated you?

"A. That is a possibility."

Do you recall giving that answer?

(Testimony of Walter R. Waldron.)

A. That is very—I don't know that I didn't. I am sure I did, but I didn't know of it, and all the inquiries I can find at the moment, we didn't.

Q. You didn't have personal charge of hauling it back, or did you?

A. No, I didn't. I was rarely in my office.

Q. Who would have charge of that operation?

A. Well, at that time our superintendent, a Mr. Yeomans.

Q. When did he start working for your company?

A. Right about the time we opened, about the first of the year there.

Q. In what capacity was he employed?

A. We had planned for him to become a partner, but he never did.

Q. Where did he work during the early stages of your operations?

A. Well, he was arranging for scaffolding, planking, nails, supply houses, opening accounts for supplies, and that sort of thing during the early stages.

Q. At which office? [279] A. Bell.

Q. Entirely there? A. That is right.

Q. Did he have anything to do with the San Bernardino operations?

A. No. We hadn't anything out there for him to be interested in at that moment.

Q. Was he ever out there at all during the course of your connection with Flintkote, before the termination date?

(Testimony of Walter R. Waldron.)

A. Not in his official capacity. He was out there and helped do the alterations in the office area we were trying to fix up one day.

Q. What alterations were actually required at San Bernardino?

A. To close up an area and make an office out of it.

Q. What was the nature of that building when you rented it?

A. It was—you mean the construction? I believe it was sheet metal roofing or tar paper roofing, a frame building, and lined inside with a fiberboard.

It has been used as some kind of a night operation or gambling place, or something of that nature prior to that, because we had trouble with the telephone out there.

They didn't want to put a telephone in there, or something, so I had to go over and get all that cleared up. [280]

Q. During the period that you were installing these jobs that were done with the Flintkote tile, did you and your partner personally do any of the installing work yourself?

A. The first few jobs we worked on, yes.

Q. Which jobs were those, if you remember, by description or name?

A. The first one I worked on was Owens Roofing.

Q. Was that sort of a special job that you talked about, that came to you more or less by accident?

A. No, there was no accident to it. It was——

(Testimony of Walter R. Waldron.)

Q. Didn't you just happen to be in the Flintkote office when the thing come up?

A. How did you happen to say I would happen to be in the Flintkote office, Mr. Black?

Q. You had reason to be there in connection with the company?

A. Why do you bring that up? What is the reason for that question, Mr. Black?

Q. I am just asking you——

The Court: Mr. Witness——

The Witness: I am sorry, sir.

The Court: ——we can't have witnesses inquiring into the techniques of the lawyers.

Mr. Ackerson: I think the question assumes a fact not in evidence, because it is cross-examination. [281]

Mr. Black: I will put it this way then:

Q. (By Mr. Black): Didn't you happen to be with Mr. Ragland at the Flintkote office when that matter first came up?

A. What matter are you referring to, sir?

Q. The possibility of getting this Owens Roofing Company job?

A. No. My last time——

Q. Try to refresh your recollection.

Mr. Ackerson: Let the witness finish.

Q. (By Mr. Black): You may finish and explain. Counsel was right. Go ahead and explain your answer.

A. Thanks for allowing me the informal way I talk about this. You want to know how I arrived

(Testimony of Walter R. Waldron.)

at the—getting the contract for the Owens Roofing job? Do I gather that as being your question, sir?

Q. Yes, basically so. Then I want to ask you a question about it, when you tell me.

A. To get the job, Bob let me know that they had an inquiry through one of their roofing salesmen, that they wanted to have an acoustical tile treatment done in their office, and asked me to go over and find out about it, so I did.

When I told the man Bob sent me over, he said, "That is fine." [282] I told the man, and again I am instructed to say who. That was Mr. McLane—McLane, I believe, is the name—Jim, a young fellow.

He was interested in this work. I was interested in doing it for him. I told him Bob sent me.

He said, "Well, in the event that they recommend you, why, then we can go ahead."

So they gave me a job and I was rather happy about it because I didn't want to lose the first job Bob had pointed out to me. And we made the installation. Is that——

Q. Well, I will ask you if it isn't a fact that you and Mr. Ragland happened to be at the Flintkote office together when the inquiry from Owens Roofing came in and was discussed in your presence by some of the Flintkote people, and that you asked Ragland if you couldn't take a whack at that job, you weren't started yet and it was an installation job basically, and you could earn a little money by doing that, and

(Testimony of Walter R. Waldron.)

he said, "Go ahead and see them"? Isn't that about what happened? A. That is entirely wrong.

Q. Nothing of that sort occurred at all?

A. Nothing of that sort happened.

Q. In any event, Mr. Ragland it was that told you to go ahead. But you think the inquiry was initiated by him and not by you, as to whether you could take the job? [283]

A. Inquiry where, Mr. Black?

Q. As to the application for the job, whether it was not suggested by you, as a result of overhearing some discussion between the Flintkote people and learning that the job was available?

A. Oh, no, sir.

Q. You don't think it started at the Flintkote office at all? A. No, sir.

Q. Where were you when you first heard about it?

A. I was either at my home, where I have a desk and work there, or at my office in Los Angeles.

Q. Now, how often were you at the Atlantic Boulevard office between the period, say, December 11th and February 15th?

A. December 11th and February 15th. After February—after January 15th I had gotten the warehousing and telephone and bank work finished in San Bernardino. I was in the L.A. office probably one day a week, two days a week, three days a week, would just stop in for a few minutes about the mail.

Q. How often were you there, say, between De-

(Testimony of Walter R. Waldron.)

cember 11th and the time when you first went to San Bernardino?

A. Well, my time in San Bernardino started right around December 27th, 28th, somewhere in there. [284]

I made inquiries on the real estate dealers and I called some by phone, and had them looking for warehousing out there.

I don't know if I stayed out there any length of time, other than a day or two at a time.

Q. During that period did you make frequent visits to the office or warehouse at Los Angeles?

A. Yes, I would be in town here perhaps every night. Maybe I would go out there during the day and come back at night. It is an hour and a half or so drive, you know.

I do that a great deal. My time out there over night was rather rare, but I would be out there a great deal during the week, maybe Monday, perhaps Tuesday, and then I wouldn't go out again until Wednesday or Thursday or Friday. [285]

Q. Would it be your practice to go direct from your home out to San Bernardino?

A. I often have.

Q. And how long does it take you to drive out there?

A. An hour and a half to two hours, roughly.

Q. What would you be doing at the Los Angeles office before your telephone was installed there?

A. Arranging materials, scaffolds, equipment, I think we bought a truck, I think we bought some

(Testimony of Walter R. Waldron.)

steel scaffolds—I think our early records show all that, don't they?

Q. Did you install some acoustical tile in the office at Los Angeles? A. Yes.

Q. What tile was that?

A. I don't remember.

Q. Where did you get it?

A. I don't remember except Bill installed it, our superintendent.

Q. Do you remember whether it was Flintkote tile or somebody else's tile?

A. No, I had no reason to use any other tile. It might have been Flintkote, but I don't know whether we installed it at that time or not.

Q. Do you recall when that was done?

A. At the moment, I don't, no. [286]

Q. Did you do it personally?

A. I didn't, no.

Q. Did you superintend it?

A. Yes, I think he put it in.

Mr. Askerson: I don't think you heard the question.

Q. (By Mr. Black): Did you oversee the job? Did you superintend the job?

A. No, I wasn't there when it went in.

Q. It was a very simple job, was it not?

A. I rather thought so.

Q. And you had no part of doing that yourself?

A. No.

Q. And that doesn't require your personal presence at the Los Angeles office? A. No.

(Testimony of Walter R. Waldron.)

Q. How long does it take for you to drive from your home to the Los Angeles office in Bell?

A. At that time about a half an hour under good traffic conditions.

Q. And as I understand it, that location is substantially at the intersection of Florence and Atlantic Boulevard?

A. Rather close, a half block or a block away.

Q. And how far away from that location is the other warehouse that you later established in the Los Angeles area?

A. I don't know in miles or yards. It would take [287] probably three or four or five minutes to drive to it.

Q. I think that we talked about the date of that thing and you were uncertain as to when that was acquired, and you would undertake to get me a memorandum if you had it. But I will ask you this, if you can recall from memory, was that second Los Angeles warehouse obtained before the termination of your relations with Flintkote?

A. I don't know. I don't know right now. I think it was.

Mr. Ackerson: You are talking about the one on the river?

Mr. Black: The one on the river that the witness mentioned.

Q. You think it was acquired before the termination date? A. I couldn't be sure of that.

Q. What was the capacity of that place?

(Testimony of Walter R. Waldron.)

A. Oh, that was quite large, I would say it was almost as large as this room.

Q. How long did you keep it?

A. Oh, three or four months, or some time. We had trouble with water there. When it rained, the water would run all through the place, so that wasn't good on acoustical tile.

Q. Did you ever use it to store any acoustical tile? A. Oh, yes, we had some in there. [288]

Q. And part of the Flintkote lot was stored in that place, wasn't it?

A. It may have been. If we still had it after the termination or if we got it after the termination, then we probably stored the material we had on hand in there or any other we purchased.

Q. You say you probably did. Your recollection isn't clear on that, is it?

A. We couldn't store any in our Bell area because it would hardly carry the scaffolding and gear that is necessary to carry on this kind of work, except a few cartons for emergency use, 10 cartons perhaps. So any material we had that wasn't in the San Bernardino warehouse would have to be in there.

Mr. Black: May I confer with my associate just a moment?

(Conference between counsel.)

Q. (By Mr. Black): On the matter of working San Bernardino, I believe that you testified that rather than install the tile yourself after you

(Testimony of Walter R. Waldron.)

were not going to be out there, you sold part of that to somebody else?

A. I don't know that we did. I only mentioned that it could have been a possibility, that someone may have wanted some. I don't know.

Q. Because it was my impression that the tile that was [289] supplied to you beyond this first shipment was limited to what you had actual contracts for and those were contracts to install, not merely sales contracts, were they not?

A. You are speaking now of the commitments I submitted in your firm's office after the severance?

Q. Yes.

A. That is correct. Those were contracts that we had and they were odd types of material, I believe. They were 24 by 24, which we didn't have in the first car. Now I know some of it was, and it is altogether possible that all of it was.

Q. And those quantities that you needed, they took into account the first car, of course, didn't they? I mean to say, when your termination occurred and Flintkote announced to you that they would give you enough tile to complete the jobs for which you had firm contracts, that of course took into account what you already had on hand from the first shipment, did it not?

A. Well, those would have been, Mr. Black—I believe you have a hospital job mentioned there, do you?

Q. I don't recall.

(Testimony of Walter R. Waldron.)

A. At Van Nuys. That would be a slow burn finish. That was not in the first car.

Q. I am not quite clear, but speaking generally, when the termination occurred and the Flintkote people announced to [290] you that they would supply you with tile sufficient to complete your firm contracts that you had, those quantities took into account the first car that had already been sent to you, didn't it?

A. I don't remember. Do you have the sizes of tile?

Q. I know what was shipped to you, of course, from the exhibits.

Mr. Ackerson: I think the witness wants the notations.

Mr. Doty: That is not the one that is in evidence.

Mr. Black: This is a copy of it.

Mr. Ackerson: Why don't you use that for reference?

Mr. Black: I think this is the same as one of the exhibits. We won't at the moment take the time to look for it. [291]

Mr. Doty: That is Plaintiffs' Exhibit 14, that is what it is a copy of.

The Witness: You will not, Mr. Black, that on this item it is 24x24 inch tile. That is quite a large size. And on the Valley Hospital it says it is slow burn, which is a special finish that we didn't have in the first order. The first order was strictly an order of no purpose other than to satisfy Bob that

(Testimony of Walter R. Waldron.)

the plant was going to shut dow and he didn't want us to get caught short.

This is all 24x24 one-half inch acoustical tile—I don't know what the S.F. means; maybe standard finish or some other special finish—but we didn't have this type of tile in the first car, you understand.

Mr. Black: Yes, I understand.

The Witness: And that is probably—I don't know what your ultimate thought was, if this was a part of the other material or the jobs were a part of the other material, this one wouldn't be, and that wouldn't be, this one might be, this one might be, because if there was any regular pattern or regular finishing it was probably put in out of the original if we had it left when the job was ready.

Mr. Ackerson: Mr. Black, Mr. Doty tells me that that is Plaintiffs' Exhibit 14 and that it is only in for identification.

Mr. Doty: That is right. It is not in evidence.

Mr. Ackerson: I am not objecting to your using it, however. [292]

Q. (By Mr. Black): I am still a little puzzled as to why, if you did sell the tile in San Bernardino to somebody else, you didn't go ahead and install it yourself and take the additional profit on it.

Mr. Ackerson: Just a minute.

The Witness: I didn't say we installed any, Mr. Black.

Q. (By Mr. Black): What is it?

A. I didn't say we installed any, sold any, Mr.

(Testimony of Walter R. Waldron.)

Black. Maybe a possibility—I don't know who we would sell it to. I know if we did, that is where it went to.

Q. It all boils down to you don't know?

A. As far as sales of material?

Q. Yes.

A. No. People come and buy a carton once in a while.

Mr. Black: I think that is all.

The Court: Does that conclude the cross-examination?

Mr. Black: Yes.

Mr. Ackerson: I won't have anything extensive, Your Honor.

The Court: Well, if it is brief, let's get it over with and we will start with a new witness on Monday.

Mr. Ackerson: It will be very brief. In fact, I may have none. May I just look over these notes?

The Court: Yes. [293]

Redirect Examination

By Mr. Ackerson:

Q. Mr. Waldron, Mr. Black asked you concerning the small shipment you signed for. I call your attention to the light handwriting on Defendants' Exhibit B, which reads "To fill shortage on orig-

(Testimony of Walter R. Waldron.)

inal shipment." Does that refresh your recollection any more than what you told Mr. Black?

A. Yes. Their truck and trailer didn't hold the amount ordered and this was signed, to be delivered at a later date.

Q. Do you know where that was delivered, the small order, the shortage?

A. This was delivered to the Bell warehouse. However, it was signed at the time the original truck and delivery was made in San Bernardino.

Q. At the time you personally performed this Owens Roofing job, was Mr. Lysfjord still with the Downer Company, do you know?

A. Well, he had severed, I remember, but they had asked him to stay on for some time. I forget just what amount of time more he had planned to stay. But it wasn't long there, because it was just a cleanup, stayover, you know, about clairfying of take-offs on jobs in progress and any changes in addendums out or alternates that would affect his work, for a few days. [294]

Q. So you don't know for certain whether he was still with Downer Company while you were performing this job or whether he had severed relations?

A. I think he was there. I believe we did that—I think he held over there until about the 10th of February, and I think we did that before February 10th.

Q. Who helped you with the job, if anybody?

A. Bill Yeomans, our superintendent.

Mr. Ackerson: That is all, Your Honor.

The Court: Any recross?

Mr. Black: No recross.

(Witness excused.)

The Court: What is your estimate now, Mr. Ackerson, of the time required to complete presentation of your case?

Mr. Ackerson: Your Honor, I don't believe I will take over a couple of days; I doubt it. I am planning on shortening the other plaintiff's testimony without covering what I have covered here any more than is necessary. I hate to make a broad estimate, but I would try very hard to finish plaintiff's case in another couple of days.

The Court: I am trying to figure how we can integrate the business of the Court, so your estimate——

Mr. Ackerson: It may be three days. I will try to make it in two.

The Court: How long do you think you will take, [295] Mr. Black?

Mr. Black: It is a little difficult to predict, because some of these matters may not require more than one witness, but without having plaintiffs' case in toto before me, it is a little hard for me to give an intelligent estimate.

I would guess two or three days would normally cover it. We will have quite a few witnesses, presumably have them, but some of them ought to be quite short, as they are merely cumulative.

Mr. Ackerson: I might add I do anticipate—I

don't say extended cross-examination on Mr. Black's witnesses, insofar as I know who they are going to be, Mr. Black, but this is the usual situation where sometimes cross-examination brings out additional facts. I just want Your Honor to be apprised of the fact I intend to utilize it.

The Court: The Court isn't trying to rush you. I am just asking for information. I would appreciate your keeping the presentation down to as brief a time as is commensurate with adequate presentation of your positions.

We will not be able to hear this case on a Monday morning, due the regular motion calendar of the Court.

We will now adjourn the matter until Monday afternoon at 2:00 o'clock.

(Whereupon, at 4:45 o'clock p.m., Friday, May 6, 1955, an adjournment was taken to Monday, May 9, 1955, at 2:00 p.m.) [296]

Monday, May 9, 1955—2:15 P.M.

The Court: Everyone is present. You may proceed.

Mr. Ackerson: Thank you. Your Honor please, during the last session I think counsel for the respective parties agreed to submit a brief.

I have a copy of the brief requested by the defendant and I want to apologize, I haven't had time to put in the exhibit in the second copy of the brief. I wonder if Your Honor will bear with me——

The Court: All right. That is the copy I work

from, that the Court works from. The other is the master copy that reposes in the Court's file. I can use the Court's file if it comes down to it.

Mr. Ackerson: Thank you, Your Honor. Copy of the plaintiffs' brief has been served upon the defendant and I have received a copy of their corresponding brief.

Mr. Black: We have delivered ours to the clerk, if the Court please.

The Court: Yes. I am sorry to keep you waiting, gentlemen. We had a 1:30 calendar and had some tag ends to be taken care of in chambers.

Mr. Ackerson: If Your Honor please, I have some witnesses here in response to subpoena duces tecums, and I think probably they are the next order of the day. [298]

The Court: You put your case on in your order.

Mr. Ackerson: May I have the representative of the R. E. Howard Company come forward.

Mr. Howard, will you take the stand up here and be sworn.

RICHARD E. HOWARD

called as a witness on behalf of the plaintiffs, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you please be seated. Your full name, sir?

The Witness: Richard E. Howard.

The Court: Mr. Howard, this is a large room and voices don't carry very well in here. People seated over there in the jury box are the ones who

(Testimony of Richard E. Howard.)

must hear you, so talk to them as if you are trying to sell them a tile job, in a good, loud voice.

The Witness: All right.

Direct Examination

By Mr. Ackerson:

Q. Mr. Howard, you are president of the R. E. Howard Company, are you?

A. Vice president.

Q. Vice president. And you were asked to bring certain documents here today in response to a subpoena duces tecum. Do you have those documents, Mr. Howard? [299]

A. The majority of them. There is one or two we don't have of the list.

Mr. Black: I am sorry, Mr. Howard. I would like to hear you, too, if I may, please. ....

The Witness: I have the majority of them. There is one or two missing from a previous list. Of course, I only have a small part of the Exhibit A.

Q. (By Mr. Ackerson): I understand that, but you have brought all the documents——

A. Yes.

Q. ——with one or two exceptions?

A. That is right.

Q. You have that applied to this list in Exhibit A? A. That is right.

Q. I was asking particularly these itemized numbered documents from No. 1 to No. 48, and your answer applies to those documents.

(Testimony of Richard E. Howard.)

A. That is right, yes.

Q. Now, also I asked for manufacturers' price lists. Did you bring those, Mr. Howard?

A. The current? No. And I don't have any of the old ones.

Q. You have no manufacturers' price lists?

A. No, I don't.

Q. Do you have a copy of the unit price list as it [300] relates to the sale of tile by acoustical contractors?

A. No, I don't. We don't use them.

Q. You did not have such a copy in your files?

A. Probably did back in 1950-51.

Q. But you do not have one now?

A. No. [301]

Q. And you brought all such correspondence or other documents relating to either manufacturers' price lists or unit price lists which you have?

A. Which I don't have.

Q. You had none? You had none of the items, the unnumbered items? A. No.

Mr. Ackerson: Very well, Mr. Howard.

Q. And those documents are the documents which I have in my hand? A. That is right.

Q. Mr. Howard, are they segregated as to these numbers?

A. Yes, each job has a name which corresponds with those numbers there, or names on those.

Mr. Ackerson: Now, if the Court please, I wonder if for convenience sake we could have this marked for identification Plaintiffs' next in order

(Testimony of Richard E. Howard.)

with the idea that we might subdivide them as A, B, C, D, later on?

The Court: Yes.

Mr. Ackerson: Will you mark that Plaintiffs' Exhibit for Identification next in order?

The Clerk: Plaintiffs' Exhibit 29 for Identification.

(The folder referred to was marked Plaintiffs' Exhibit No. 29 for Identification.) [302]

Mr. Ackerson: Thank you, Mr. Howard. That is all.

Do you have any questions, Mr. Black?

Mr. Black: No questions.

(Witness excused.)

Mr. Ackerson: Will the witness for the Paul H. Denton Company please step forward?

LEE L. ARMSTRONG

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: Your full name, sir?

The Witness: Lee L. Armstrong.

Direct Examination

By Mr. Ackerson:

Q. Mr. Armstrong, you are appearing today in response to a subpoena duces tecum listing certain documents which were to be supplied?

A. Yes.

(Testimony of Lee L. Armstrong.)

Q. And do you have those documents with you?

A. Yes, I do.

Q. Will you produce them?

A. (Producing documents.)

Q. Mr. Armstrong, can you tell me generally what these documents are which you have produced?

A. Well, there are six of the named jobs there that the Paul H. Denton Company installed. [303]

Q. And the jobs that you are referring to are the numbered requests on the subpoena duces tecum, that is, Nos. 1 to 48, inclusive?

A. Six of those is all we had anything to do with.

Q. That is all you performed?

A. That is right.

Q. And they are all the documents you had relating to the 48 jobs? A. That is right.

Q. Now, Mr. Armstrong, there were three other additional requests. Did you bring any manufacturers' price lists in these documents?

A. No, I didn't.

Q. Do you have any?

A. Not to my knowledge, we don't.

Q. What acoustical tile do you handle?

A. Armstrong Cushion Tone and—that is about it.

Q. Do you handle another line in addition to that? A. We have.

Q. What was that? A. Pioneer-Flintkote.

Q. When did you cease handling Pioneer-Flintkote?

(Testimony of Lee L. Armstrong.)

A. I would say in '51, somewhere around there.

Q. It might have been in '52?

A. It might have been. [304]

Q. Did Flintkote supply you with their manufacturers' price list at the time you handled their tile?

A. They may have at that time but I don't know where it is now.

Q. And does Armstrong?

A. I believe we had some of theirs, too.

Q. But you do not have any now, that is your answer? A. No, I don't.

Q. What about the second request, Mr. Armstrong, relating to the unit or other price list used, circulated or in any manner utilized or referred to in formulating bids for the sale of acoustical tile by contractors?

A. We don't have any unit price lists.

Q. Did you ever have any? A. No.

Q. Your statement is that you never did utilize such a list? A. No.

Q. And you have none in your possession at the present time? A. No, I don't.

Q. So that the total amount of documents here relate to the five or six jobs enumerated on the subpoena duces tecum which Acoustics, Inc., performed? A. Yes. [305]

Mr. Ackerson: May we have this series of documents contained in one folder marked with the same understanding and marked Plaintiffs' Exhibit next in order?

The Court: Yes.

The Clerk: Plaintiffs' 30 for Identification.

(The document referred to was marked Plaintiffs' Exhibit No. 30 for Identification.)

Mr. Ackerson: That is all, Mr. Armstrong. Thank you.

Mr. Black: Just one question that I wanted to ask, please.

Cross-Examination

By Mr. Black:

Q. Mr. Armstrong, you are not at all sure of the date when you stopped dealing with Flintkote products? A. No, I am not.

Q. It could in fact have been considerably earlier than 1952, could it not?

A. It could be, yes. It could be in 1950 or '49.

Q. My impression is it was quite a bit earlier than '52. I don't have the exact dates from our records.

A. I am sure it was. I am sure it was earlier.

Redirect Examination

By Mr. Ackerson:

Q. It could have been as late as February, 1952, could it not? You are not saying it as a fact that it was before February [306] '52, are you?

A. It would be before that, yes.

Q. You are positive of that?

A. Quite positive.

Mr. Ackerson: Very well. That is all.

(Witness excused.) [307]

Mr. Ackerson: May we have the representative of Sound Control Company step forward, please.

ROBERT RANDALL SMITH

called as a witness on behalf of the plaintiffs, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you please be seated. Your full name, sir?

The Witness: Robert Randall Smith.

Direct Examination

By Mr. Ackerson:

Q. Will you state your name a little louder?

A. Robert Randall Smith.

Q. Mr. Smith, you are appearing here today in response to a subpoena duces tecum requiring you to bring along certain documents, are you?

A. Yes, sir.

Q. And those documents are numbered 1 to 48. Do you have those documents? A. Yes, sir.

Q. They are contained in this folder (indicating)? A. Yes, sir.

Q. In this folder are documents contained required by the unnumbered paragraphs, namely, do you have any manufacturers' price lists?

A. No, sir. [308]

Q. What is your position with your company?

A. You might say assistant sales manager.

Q. Did you ever have such manufacturers' price lists?

(Testimony of Robert Randall Smith.)

A. We have manufacturers' price lists, of course, but I don't have them for that period, that I know of.

Q. You don't have them for the period January 1, 1950, to and including January 1, 1953?

A. No, sir.

Q. You have no such price lists that were in effect during that period?

A. Not to my knowledge.

Q. Does this envelope that you produced, Mr. Smith, contain any unit list prices, or, price lists, I should say, that were used or considered by acoustical tile contractors during the period January 1, 1950, to January 1, 1953?

A. No, it doesn't.

Q. Have you ever had any such price lists?

A. From time to time there has been a price list we have used in our firm, but we don't have one now.

Q. You don't have any? A. No.

Q. So they are not included? A. No, sir.

Q. Is there any correspondence relating to—I will read the last: [309]

"All correspondence or other documents relating to estimating or price practices sent to or received from any other member of the Acoustical Tile Contractors Association between the same dates, January 1, 1950, and January 1, 1953"?

A. There is nothing in that folder (indicating).

Q. Is it your statement that as of today there are no such documents in your files?

(Testimony of Robert Randall Smith.)

A. Yes, sir.

Mr. Ackerson: I will ask that this folder be marked Plaintiffs' for identification next in order, with the same understanding of subdivisions later.

The Clerk: Plaintiffs' 31 for identification.

(The folder referred to was marked Plaintiffs' Exhibit 31 for identification.)

Q. (By Mr. Ackerson): Mr. Smith, with respect to the item of—the second numbered item, relating to acoustical tile contractors' price lists, I believe you stated you have had such documents and used them? A. Yes, I believe I did.

Q. Your statement is merely they are not in the files of your company at the present time?

A. That is true.

Mr. Ackerson: That is all, Mr. Smith.

(Witness excused.) [310]

Mr. Ackerson: May we have the representative of Coast Insulating Products Company?

GUSTAV J. KRAUSE

called as a witness on behalf of the plaintiffs, having been first duly sworn, was examined and testified as follows:

The Clerk: Please be seated, sir. Your full name, please, sir?

The Witness: Gustav J. Krause.

The Court: We can hardly hear you, Mr. Krause.

(Testimony of Gustav J. Krause.)

We are supposed to hear everything you say. Boom out a little bit.

The Witness: Yes, your Honor.

Direct Examination

By Mr. Ackerson:

Q. Your name is Mr. Gustav Krause?

A. That is right, sir.

Q. What is your position with the Coast Company? A. Vice president.

Q. Mr. Krause, you appear here today in response to a subpoena duces tecum requesting you to produce certain documents on behalf of your company, is that correct?

A. That is correct, sir.

Q. And you have produced those documents?

A. I have.

Q. These are the documents which I am holding (indicating)? [311] A. That is correct, sir.

Q. Those documents, can we describe them generally? A. They are folders.

Q. And they are job folders relating to the jobs which Coast Insulating did as numbered on the subpoena duces tecum?

A. That is correct, sir.

Q. Are they all there, Mr. Krause?

A. All of them that we have done.

Q. All of them that Coast did?

A. That is correct, sir.

Q. Are there any other documents in this folder?

(Testimony of Gustav J. Krause.)

A. No, sir.

Q. Are there any other manufacturers' price lists? A. No, sir.

Q. What tile does your company handle, Mr. Krause?

A. Simpson acoustical tile and Flintkote.

Q. And those companies have, I take it, from time to time, given you price lists of their products, haven't they? A. That is correct, sir.

Q. But you do not have any of them in your files at the present time?

A. Each price list is superseded and we don't keep the old price lists.

Q. Has the price list been superseded since January 1, [312] 1953? A. That is correct, sir.

Q. So that the price lists which were requested are no longer in your file?

A. That is correct, sir.

Q. Now, what about the price lists requested relating to the installation of acoustical tile, do you have any of those in your file?

A. We don't have installation price lists.

Q. You have none whatever? A. No, sir.

Q. Have you ever had? A. No, sir.

Q. You have never used the price lists relating to the cost for installing tile?

A. Our jobs are estimated on the job-to-job basis.

Q. That is true, but have you ever had a price list indicating what you should charge per unit of tile, or anything of that sort?

(Testimony of Gustav J. Krause.)

A. Well, we have a standard price list which is put out by the manufacturers.

Q. That is the price they charge you, your company? A. That is right, sir.

Q. Have you had a price list indicating a price that should be charged per unit or otherwise for installing tile by your company?

A. Do you mean a unit price list? [313]

Q. Well, I mean any price list that you followed or that you utilized in making a bid to install acoustical tile.

A. We use a straight manufacturer's price list and break our jobs from that point on.

Q. In other words, you say we use the manufacturer's price list at perhaps 10 cents a square foot and whatever it may be, and we add to that in bidding a job, is that your statement?

A. That is true.

Q. Now, did you ever have that addition computed and put on a piece of paper for more convenient use?

A. Oh, yes, we have that kind. We carry a regular standard list of that type.

Q. But that is not included in these documents?

A. No, sir.

Q. Do you have that type of a list for the period January 1, 1950, such a list that you used between January 1, 1950, and January 1, 1953?

A. No, sir, we didn't use a price list at that time.

Q. So that you never did have this computation on paper of a mark-up for convenience or other-

(Testimony of Gustav J. Krause.)

wise? A. No, sir.

Q. To bid a job during that period?

A. No, sir.

Q. And those folders of documents you have produced, [314] do they contain any correspondence relating to estimating or bidding between your company and other members of the Acoustical Contractors' Association? A. No, sir.

Q. Do you have any such documents in your files? A. No, sir.

Q. Have you had any such documents in your file? A. No, sir.

Mr. Ackerson: I will ask that these documents be marked Plaintiffs' exhibit for identification next in order.

The Clerk: Plaintiffs' Exhibit 32 for identification.

(The document referred to was marked Plaintiffs' Exhibit No. 32 for identification.)

Mr. Ackerson: That is all, Mr. Krause.

(Witness excused.)

Mr. Ackerson: May we have the representative of the Harold E. Shugart Company step forward?

EVELYN ESTHER SHEEHY

called as a witness by and on behalf of the plaintiffs, having been first duly sworn, was examined and testified as follows:

The Clerk: Your name, please?

A. Evelyn Esther Sheehy.

The Clerk: Will you spell your last name?

The Witness: S-h-e-e-h-y. [315]

Direct Examination

By Mr. Ackerson:

Q. Is it Mrs. Sheehy?

A. No, it is Miss Sheehy.

Q. Miss Sheehy, what is your position with the Shugart Company?

A. Secretary-treasurer, office manager.

Q. Did you have anything to do with compiling these documents you are submitting today?

A. I just helped a girl pull them from the files this morning.

Q. Under whose direction did you do that?

A. My direction. I got the job numbers for her and we looked in the files and pulled them out.

Q. And these are all the documents you were able to find in response to the subpoena duces tecum? A. Yes, sir.

Q. In the files of the Shugart Company?

A. Yes, sir.

Q. These documents consist generally of job documents, various documents on various jobs performed by the Shugart Company?

(Testimony of Evelyn Esther Sheehy.)

A. Yes, sir.

Q. Miss Sheehy, are there any documents in these that you have submitted today relating to manufacturer's list [316] prices?

A. I don't really know exactly what you mean. There might be some prices used in bidding these, that would be manufacturer's prices.

Q. What particular tile does your company handle, do you know?

A. We have the franchise products of the Celotex Corporation.

Q. Any other company?

A. No, not any franchise products.

Q. Do you handle any other acoustical tile other than Celotex? A. No, that is what I mean.

Q. Do you have any price lists from Celotex Company, lists of prices that you buy tile by?

A. (Pause.)

Q. You have seen such price lists around the company, haven't you? A. Yes.

Q. Are any of such price lists in these documents that you have submitted this morning?

A. I wouldn't think so, no.

Q. If I asked you, would you submit such prices or would you send those prices into court?

A. Well, I don't know whether we would have any except [317] maybe a very current price list. It couldn't have been the price list for this time.

Q. Do you know what the price lists are? Do you know whether it has varied, say your current

(Testimony of Evelyn Esther Sheehy.)

list as to 12 x 12 one-half inch tile? Are you acquainted with that part of the business?

A. I don't have too much to do with the pricing. I do the office management.

Q. Then I take it your answer is, Miss Sheehy, that the price lists called for between January 1, 1950, and January 1, 1953, have been superseded in some way? A. Yes.

Q. By more recent price lists?

A. That is true.

Q. And you do not have the ones that I called for, is that right?

A. I don't have them here. I don't know as we would have any around the place that old. There was a few price lists that just went into effect.

Q. If you don't know these answers, tell me. I am trying to decide whether to ask you to bring me some more documents or not.

A. I wasn't subpoenaed, you know.

Q. I realize that. Your company was, but you appeared for your company. [318] A. Yes.

Q. Do you know enough about the business to know that when there is a superseding price list that there may be a change of price that may be on a specialty tile or something, that that would require a new price list? A. I do.

Q. That is true, isn't it? A. Yes.

Q. Just one change on one specialty item and you get a new price list, is that right?

A. Well, no, they don't always put out a new

(Testimony of Evelyn Esther Sheehy.)

price list, if they change the price of one item. Is that what you mean?

Q. Yes. A. No, I don't think so.

Q. Do you know whether there has been a change on price of 12 x 12 one-half inch acoustical tile since 1953?

A. I couldn't say—from 1951 to '53, you mean now?

Q. Yes. A. I wouldn't know back that far.

Mr. Ackerson: Thank you, Miss Sheehy.

I will ask that this be marked Plaintiffs' exhibit for identification next in order.

The Clerk: Plaintiffs' Exhibit 33 for identification. [319]

(The document referred to was marked Plaintiffs' Exhibit No. 33 for identification.)

Mr. Ackerson: That is all, Miss Sheehy. Thank you.

(Witness excused.)

Mr. Ackerson: Is there a representative of the L. D. Reeder Company here?

WILLIAM S. REEDER

called as a witness by and on behalf of the plaintiffs, having been first duly sworn, was examined and testified as follows:

The Clerk: Your full name?

The Witness: William S. Reeder.

The Clerk: Will you spell your last name?

The Witness: R-e-e-d-e-r.

(Testimony of William S. Reeder.)

Direct Examination

By Mr. Ackerson:

Q. Mr. Reeder, what is your position with the L. D. Reeder Company?

A. I am the manager of the Los Angeles office.

Q. And you are appearing here today in response to a subpoena duces tecum? A. Yes.

Q. Do you have the documents called for in that subpoena?

A. I have located one job, No. 39 on your [320] list.

Q. Can you state that that is the only job you performed of the jobs listed on that list?

A. To my knowledge that is the only one. I looked through the file and that is the only one I could find.

Q. Did you make a thorough search?

A. Yes.

Q. Is it possible there could have been other jobs?

A. I would say not. I made a very complete search.

Q. You ordinarily keep the records of these jobs the L. D. Reeder Company actually performs for a matter of four or five years, don't you?

A. That is right.

Q. So that if any job that you performed was missing, it would be a matter of missing it?

A. That is correct.

Q. And it could be located later? A. Yes.

(Testimony of William S. Reeder.)

Q. There were three other items, Mr. Reeder. Does this file contain any manufacturer's price lists in the possession of the Reeder Company between January 1, 1950, and January 1, 1953?

A. No, it does not.

Q. Do you have any such price lists in your file?

A. No, we destroy all old price lists to avoid confusion. [321]

Q. When did you get price lists after January 1, 1953?

A. I believe the last price list—well, the last one came out February of this year, I believe. [322]

Q. What tile does your company use?

A. Armstrong Cork.

Q. Armstrong Acoustical, isn't it?

A. Yes.

Q. Does this folder you have submitted contain any pricing material? I mean any price lists relating to the installation of acoustical tile by L. D. Reeder Co.?

A. It contains my estimate in there of what I think the labor should be, and the material, and so forth.

Q. But that relates only to this one contract?

A. Well, all our jobs are broken down that way.

Q. I know, but the price lists you are talking about is your work in connection with this one contract? A. This particular job, that is right.

Q. I am asking you about a price list or a price compilation for guidance on any job you list.

A. Well, we did use one. We haven't used one

(Testimony of William S. Reeder.)

here recently, because we made mistakes on some jobs. That is a good way to check and see if we are figuring the jobs right.

Q. Did you use such a list during the period, between the period January 1, 1950, and January 1, 1953? A. No, sir.

Q. Are you—— A. This is just a new one.

Q. Your statement is you never did use a unit price [323] list for figuring the installation of acoustical tile on a job.

A. Not during those dates. We do now; we have a check.

Q. But never prior to January 1, 1953?

A. No, sir.

Mr. Ackerson: May I ask this folder be marked as Plaintiffs' Exhibit for identification next in order?

The Clerk: Plaintiffs' 34 for identification.

(The folder referred to was marked Plaintiffs' Exhibit 34 for identification.)

Q. (By Mr. Ackerson): Would you mind staying there just a moment, Mr. Reeder?

Mr. Reeder, if I should call your attention to an additional job which L. D. Reeder Co. performed during this period, and which you were unable to find in your search, in response to the subpoena, would you be willing to bring them in?

A. If I can find them. I will be happy to look for them.

Mr. Ackerson: That is all. Thank you.

(Witness excused.)

Mr. Ackerson: I will call the representative of Acoustics, Incorporated. [324]

HOWARD CARLTON SMITH

called as a witness on behalf of the plaintiffs, having been first duly sworn, was examined and testified as follows:

The Clerk: Pelase be seated. Your full name, sir?

The Witness: Howard Carlton Smith.

Direct Examination

By Mr. Ackerson:

Q. Mr. Smith, you are with Acoustics, Incorporated, is that your company?

A. That is right, sir.

Q. What is your position with that company?

A. Vice president, sir.

Q. You are appearing today in response to a subpoena duces tecum issued by the plaintiffs?

A. That is correct, sir.

Q. And do you have the documents called for?

A. Yes.

Q. Would those documents consist of the jobs on the list in the subpoena which Acoustics, Incorporated, performed? A. Yes, sir.

Q. Do the documents likewise include any manufacturers' price lists during the period January 1, 1950, to January 1, 1953? A. No, sir.

Q. Can you explain why they are not present in these [325] documents?

A. As a new price list comes out we destroy the

(Testimony of Howard Carlton Smith.)

old, to avoid confusion, and we don't have any list of prices prior to, I believe, January of this present year.

Q. What tile does Acoustics, Incorporated, handle, that is, acoustical tile?

A. We handle Pioneer-Flintkote acoustical tile.

Q. How long have you handled that?

A. Well, I am a little vague on this. I believe we took the line on in about 1952, or the first part of '52.

Q. And would it be about February, 1952, Mr. Smith? A. I would say so, possibly.

Q. Do you handle any other tile, any other brand of acoustical tile, other than Flintkote?

A. We have bought Fir-Tex acoustical tile.

Q. Did you handle Fir-Tex prior to February of '52? A. Yes, sir.

Q. So that Flintkote was a new line for you?

A. Yes, sir.

Q. Now, did Flintkote issue you price lists in '52, when you took on their line? A. Yes, sir.

Q. You had a price list, of course, from Fir-Tex at that time. Was that the other line you had?

A. Yes. [326]

Q. But both of those price lists have been superseded? A. Since then.

Q. Since '53? A. Since that time.

Q. Do these documents which you have produced, Mr. Smith, contain any pricing material or pricing information which Acoustics, Inc., or your company used in connection with submitting bids or figuring bids during 1950 to '53?

(Testimony of Howard Carlton Smith.)

A. I am sure there must be some evidence—we secured the contract.

Q. I mean aside from your figuring on the contract, is there any unit price list your company used or that you have submitted today?

A. Not to my knowledge, no, sir.

Q. In other words, you were not able to find any such list as that, or any such compilation or any such written information that you used in assisting you or your salesmen in computing an acoustical tile bid during that period?

A. You are talking about a unit?

Q. A unit price list, yes. Installed price 30 cents per square foot, ½ inch, 12 x 12, acoustical tile. I don't mean the figures, but some such things as that.

A. No, not to my knowledge.

Q. Not to your knowledge, that there are any such documents? [327]

A. Any such documents here.

Mr. Ackerson: I see. I will ask these folders be marked Plaintiffs' Exhibit for identification next in order.

The Clerk: Plaintiffs' 35 for identification.

(The folders referred to were marked Plaintiffs' Exhibit 35 for identification.)

Mr. Ackerson: Thank you, Mr. Smith.

Mr. Black: One moment, Mr. Smith.